(10)

No. 99-2071-CFX Title: Tuan Anh Nguyen and Joseph Boulais, Petitioners
v.
Immigration and Naturalization Service

Docketed: June 26, 2000
Court: United States Court of Appeals for the Fifth Circuit

See also:
99-1872

Entry	Date	Proceedings and Orders
	Jun 26 2000	Petition for writ of certiorari filed. (Response due August 25, 2000)
	Jul 21 2000	Order extending time to file response to petition until August 25, 2000.
	Aug 23 2000	Brief of respondent Immigration and Naturalization Service filed.
	Sep 6 2000	DISTRIBUTED for Conference of September 25, 2000
	Sep 20 2000	Letter and attachment received from the Solicitor General and distributed.
	Sep 26 2000	Petition GRANTED. The brief of petitioners is to be file with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, November 13, 2000. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, December 13, 2000. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 29, 2000. Rule 29.2 does not apply. SET FOR ARGUMENT January 9, 2001. **********
	Nov 13 2000	Joint appendix filed.
	Nov 13 2000	Brief of petitioners Tuan Anh Nguyen and Joseph Alfred Boulais filed.
	Nov 13 2000	Brief amici curiae of National Women's Law Center, et al. filed.
	Nov 13 2000	Brief amici curiae of Equality Now, et al. filed.
	Nov 13 2000	Brief amicus curiae of Asian American Legal Defense and Education Fund filed.
	Nov 16 2000	Record filed.
	Dec 5 2000	CIRCULATED.
	Dec 13 2000	Brief of respondent Immigration and Naturalization Service filed.
	Dec 29 2000	Reply brief of petitioners Tuan Anh Nguyen, et al. filed.
	Jan 4 2001	Record filed.
	Jan 9 2001	ARGUED.

No. _____ (1)

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

TUAN AHN NGUYEN AND JOSEPH BOULAIS,

Petitioners,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

On Petition For a Writ of Certiorari to The United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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45 pp

QUESTION PRESENTED

Whether the distinction in 8 U.S.C. § 1409 between out-of-wedlock children of United States citizen mothers and out-of-wedlock children of United States citizen fathers is a violation of the Fifth Amendment to the United States Constitution?

LIST OF PARTIES

The parties to the proceeding below were the Petitioners Tuan Anh Nguyen and Joseph Boulais, and the Respondent Immigration and Naturalization Service.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED..... 2

STATEMENT OF THE CASE..... 5

A. Factual Background..... 5

B. Proceedings Below.....6

REASONS FOR GRANTING THE PETITION..... 10

I. THE COURT SHOULD RESOLVE THE CONFLICT IN THE CIRCUITS CONCERNING THE CONSTITUTIONALITY OF § 1409 10

II. THIS CASE IS AN APPROPRIATE VEHICLE FOR DETERMINING THE CONSTITUTIONALITY OF § 1409.....11

III. THE COURT SHOULD GRANT CERTIORARI TO ADDRESS THE IMPORTANT QUESTION OF THE CONSTITUTIONALITY OF § 1409.....14

CONCLUSION..... 17

APPENDIX A (court of appeals' opinion, April 17, 2000) 1a

APPENDIX B (the Board of Immigration Appeals' denial of the motion for reconsideration).....14a

APPENDIX C (the Board of Immigration Appeals' order)..... 17a

APPENDIX D (deportation order).....20a

TABLE OF AUTHORITIES

CASES

Page

Breyer v. Meissner, No. 98-1842, 2000 U.S. App. LEXIS 12453 (3d Cir., June 6, 2000)..... 11, 15

Califano v. Goldfarb, 430 U.S. 199 (1977)..... 15

Fiallo v. Bell, 430 U.S. 787 (1977) 9

Lake v. Reno, No. 99-4125 (2d Cir. argued Mar. 31, 2000)..... 14

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 12

Miller v. Albright, 523 U.S. 420 (1998) ..... *passim*

Mississippi University for Women v. Hogan, 458 U.S. 718 (1982) 15

Nguyen v. INS, 208 F.3d 528 (5th Cir. 2000)... *passim*

Rainey v. Chever, 527 U.S. 1044 (1999)..... 15

Terrell v. INS, 157 F.3d 806 (10th Cir. 1998)..... 14

United States v. Ahumada-Aguilar, 189 F.3d 1121 (9th Cir. 1999) 4, 10, 11, 14, 16

United States v. Virginia, 518 U.S. 515 (1996) 9, 15, 16

Weinberger v. Weisenfeld, 420 U.S. 636 (1975) 15

STATUTES

28 U.S.C. § 1254(1) 2

8 U.S.C. § 1105a(5) 7

8 U.S.C. § 1409 ..... *passim*

Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. 104-208, 110 Stat. 3009, § 309(c)(I)(4) 7

MISCELLANEOUS

Amicus Brief of the ACLU, et al., *Miller v. Albright*, LEXIS 1996 U.S. Briefs 1060 (1997)(No. 96-1060) 15, 16

Petition for certiorari, *United States v. Ahumada-Aguilar*, 189 F.3d 1121 (9th Cir.), *petition for cert. filed*, (U.S. May 22, 2000) (No. 99-1872) 4, 5, 10, 11, 12, 13

Cornelia T.L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in* Miller v. Albright, 1998 Sup. Ct. Rev. 1.....15, 16

Richard G. Wood, *When a Majority Loses on the Merits:* Miller v. Albright *and the Problem of Splintered Judgments*, 29 Seton Hall L. Rev. 816 (1998)..... 15

No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

TUAN ANH NGUYEN;
JOSEPH ALFRED BOULAIS,
Petitioners,

v.

IMMIGRATION AND
NATURALIZATION SERVICE,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners Tuan Anh Nguyen and Joseph Boulais respectfully petition for writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on April 17, 2000.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 208 F.3d 528 (5th Cir. 2000) and is reproduced in the Appendix filed herewith. App. at 1a-13a. The opinion of the Board of Immigration Appeals on reconsideration is unreported and is reproduced at App. at 14a-16a. The initial

opinion of the Board of Immigration Appeals is unreported and is reproduced at App. at 17a-21a. The deportation order of the Immigration Judge is unreported and is reproduced at App. at 20a-21a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on April 17, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law.

2. Section 309 of the Immigration and Nationality Act (INA), ch. 477, 66 Stat. 238 (1952), as amended, 8 U.S.C. 1409, provides in pertinent part:

> Children born out of wedlock.
>
> (a) The provisions of paragraphs (c), (d), (e), and (g) of section 301 (8 U.S.C. 1401), and of paragraph (2) of section 308 (8 U.S.C. 1408), shall apply as of the date of birth to a person born out of wedlock if --
>
> (1) a blood relationship between the person and the father is established by clear and convincing evidence,

> (2) the father had the nationality of the United States at the time of the person's birth,
>
> (3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and
>
> (4) while the person is under the age of 18 years[1] --
>
> (A) the person is legitimated under the law of the person's residence or domicile,
>
> (B) the father acknowledges paternity of the person in writing under oath, or
>
> (C) the paternity of the person is established by adjudication of a competent court.
>
> * * * * *
>
> (c) Notwithstanding the provision of subsection (a) of this section, a person born . . . . outside of the United States and out of wedlock shall be held to have acquired at birth the

[1] Before 1986, this section required paternity to be "established by legitimation" before the child's twenty-first birthday. Nguyen belongs to a class of children who may elect whether to have the "old" or "new" § 1409 govern their cases. *See* note following 8 U.S.C. § 1409 (effective date of 1986 Amendment) (quoting § 23(e), Pub. L. 100-525, § 8(r), 102 Stat. 2619). Because no formal legitimation or recognition took place until after his twenty-first birthday, Nguyen is unable to comply with either requirement. As such, it is irrelevant which version of the law he elects to follow.

nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year.

INTRODUCTION

The issue in this case is whether a federal statute, 8 U.S.C. § 1409, violates the equal protection guarantee of the Fifth Amendment by imposing different standards on citizen fathers than on citizen mothers for conferring citizenship on their foreign-born out-of-wedlock children. In *Miller v. Albright*, 523 U.S. 420 (1998), the Court granted *certiorari* to resolve that question but failed to do so because the citizen father was not a party to the proceedings before this Court. The Ninth and Fifth Circuits are now divided on the constitutionality of § 1409. *See United States v. Ahumada-Aguilar*, 189 F.3d 1121 (9th Cir. 1999), *petition for cert. filed* (U.S. May 22, 2000) (No. 99-1872); *Nguyen v. INS*, 208 F.3d 528 (5th Cir. 2000). The Solicitor General has asked this Court to review the judgment of the Ninth Circuit declaring the statute unconstitutional, and petitioners in the instant case seek review of the Fifth Circuit's ruling upholding the statute. For the reasons stated below, *certiorari* is warranted to resolve this important and recurring dispute over the constitutionality of a federal statute governing citizenship.

The instant case is the appropriate vehicle for resolving the constitutionality of § 1409. Unlike *Miller*, both the citizen father and his child are parties to this proceeding. Therefore, the standing question that prevented a definitive merits ruling in *Miller* is not present here. In contrast, because only the child is before the Court in *Ahumada-Aguilar*, that case may raise the same question of standing

that divided the *Miller* Court. Indeed, the Government's principal argument in its *Ahumada-Aguilar certiorari* petition is that the Court should not reach the constitutionality of § 1409 in that case because the child lacks standing to assert his father's equal protection claim. Accordingly, if the Court determines that the equal protection question warrants plenary review, the instant case is the appropriate vehicle because it insures that the constitutional question will be squarely presented.

STATEMENT OF THE CASE

A. Factual Background

Petitioners Tuan Anh Nguyen and his father Joseph Boulais seek review of an order of the Fifth Circuit Court of Appeals which held that 8 U.S.C. § 1409, which imposes more restrictive requirements for conferring citizenship by citizen fathers than by citizen mothers, does not contravene the equal protection component of the Fifth Amendment.

Tuan Anh Nguyen was born in Saigon, Vietnam on September 11, 1969, the natural son of Joseph Alfred Boulais, an American citizen. Boulais never married Nguyen's mother, a Vietnamese national who abandoned Nguyen soon after his birth. Boulais stayed in Vietnam after his honorable discharge from the military and eventually married another Vietnamese woman who helped him raise Nguyen. When the government of Vietnam fell to communist forces in April 1975, Boulais and his wife were on a trip out of the country. Boulais and his wife returned immediately to the United States. Nguyen's step-grandmother fled with Nguyen on an American ship carrying refugees out of Saigon, and Nguyen was paroled into the United States as a refugee. Nguyen became a

lawful permanent resident of this country and was cared for and raised throughout his childhood by Boulais and his wife. R. at 33.[2]

Nguyen's natural mother never made any attempt to obtain custody and never communicated with Nguyen or Boulais after she abandoned the infant Nguyen. Boulais raised his son, supported him financially, and provided him with a home. Boulais never formally legitimated Nguyen. *Id.*

B. Proceedings Below

In 1992, Nguyen was convicted of sexual assault and has served his sentence for that offense. R. at 151-56. In 1995, he was placed in deportation proceedings by the Immigration and Naturalization Service. *Id.* at 183-87. On January 30, 1997, he was ordered deported by an immigration judge. App. at 20a. His appeal to the Board of Immigration Appeals ("BIA") was dismissed on June 2, 1998. *Id.* at 17a ("BIA ruling"). Nguyen is now detained by the Immigration and Naturalization Service, subject to deportation to Vietnam.

Prior to the BIA ruling, on February 3, 1998, Boulais obtained an Order of Parentage from a Texas District Court, declaring him to be the father of Nguyen and holding that a parent-child relationship exists between the father and the child for all purposes. R. at 26-29. DNA testing confirmed to a 99.98% degree of certainty that Boulais is Nguyen's biological father. *Id.* at 23-24. That evidence was presented to the BIA but apparently was not taken into account when

[2] Certified Administrative Record submitted to the court of appeals by the Immigration and Naturalization Services on August 5, 1998 [hereinafter R.].

the BIA dismissed Nguyen's appeal. Nguyen moved for reconsideration, in part, to ask the BIA to consider that evidence. The BIA denied the motion for reconsideration. App. at 16a.

On June 30, 1998, Nguyen and Boulais timely filed a petition for review of the BIA ruling with the Fifth Circuit Court of Appeals. Nguyen and Boulais filed their petition for review of the BIA ruling pursuant to 8 U.S.C. § 1105a(5) (1994), which confers jurisdiction on the courts of appeals to hear appeals of deportation orders based on nonfrivolous claims to United States citizenship.[3] They argued that § 1409 violates the Fifth Amendment of the United States Constitution, which guarantees equal protection of the law, because the statute imposes different requirements on citizen fathers and citizen mothers for conferring citizenship on their foreign-born out-of-wedlock children.

On July 2, 1998, Nguyen and Boulais also jointly filed an action in the District Court for the Southern District of Texas seeking review of the BIA ruling and requesting declaratory relief that Nguyen has been a United States citizen since birth.[4]

On April 17, 2000, the Fifth Circuit first held that the governing jurisdictional statute conferred jurisdiction to

[3] *See* 8 U.S.C. § 1105a(a)(5)(19994). The petition for review is governed by former 8 U.S.C. § 1105a, as amended by the "transitional" judicial review rules enacted by IIRIRA, which apply to deportation proceedings initiated before April 1, 1997. *See* Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. 104-208, 110 Stat. 3009, § 309(c)(I)(4).

[4] The District Court has held that action in abeyance pending the outcome in the Court of Appeals and action on this petition.

determine the citizenship claim. App. at 6a. On the citizenship claim, the court found that, because a Texas court had entered an "Order of Parentage" establishing Boulais to be Nguyen's biological father, no genuine issue of material fact existed and there was therefore no need to remand the case to the District Court for any factual determination. *Id.*

Turning to the equal protection argument, the Court of Appeals reviewed this Court's fractured decision in *Miller v. Albright*, 523 U.S. 420 (1998), which generated five separate opinions. In *Miller*, a six-Justice majority affirmed the denial of the petitioner's claim to citizenship. Two of those Justices concurred in the result only because, in their view, the petitioner lacked third-party standing to raise the equal protection rights of her father (who was not a party to the case before this Court). Thus, heightened scrutiny did not apply. 523 U.S. at 451 (O'Connor, J., concurring in the judgment). Solely on that limited basis, Justices O'Connor and Kennedy joined the result reached by Justice Stevens and Chief Justice Rehnquist, who concluded that the statute survived heightened scrutiny, *id.* at 423, and Justices Scalia and Thomas, who concluded in their concurrence that the Court lacked authority to recognize the petitioner as a citizen, *id.* at 453.

Significantly, the opinion of Justice O'Connor (joined by Justice Kennedy) also stated that "I do not share Justice Stevens' assessment that the provision withstands heightened scrutiny . . . . It is unlikely . . . that any gender classifications based on stereotypes can survive heightened scrutiny[.]" *Id.* at 451-52 (O'Connor, J., concurring in the judgment). The three dissenting Justices -- Justices Breyer, Souter, and Ginsburg -- likewise concluded that § 1409 does not survive heightened scrutiny because the discriminatory burdens placed on fathers "lack the 'exceedingly persuasive' support that the Constitution requires." *Id.* at 472 (Breyer, J.,

dissenting) (*quoting United States v. Virginia*, 518 U.S. 515, 530 (1996)). Therefore, as Justice Breyer (with the concurrences of Justices Souter and Ginsburg) recognized, "a Court majority does not share" the "assessment that the provision withstands heightened scrutiny." *Id.* at 476 (quotation omitted); *see also id.* at 460 (Ginsburg, J., dissenting) (recognizing that a "solid majority [of the Court] adheres to [the] vital understanding" that sex-based classifications based on stereotypes are unconstitutional).

Faced with these fractured opinions, the Fifth Circuit in this case first held that heightened scrutiny was the appropriate standard of review, rejecting the Government's argument that the lesser standard set forth in *Fiallo v. Bell*, 430 U.S. 787 (1977), should apply. App. at 11a. The Fifth Circuit found that Boulais was a proper party to challenge the constitutionality of § 1409 and that Boulais, unlike the father in *Miller*, "ha[d] made every effort to represent his own interests in the present suit." *Id.* at 9a-10a.

The court then applied *Miller* in addressing the constitutionality of § 1409. Here, however, the court followed only the reasoning in the opinion of Justice Stevens. Addressing the argument that § 1409 is unconstitutional because it relies on outmoded stereotypes about fathers and mothers, the court noted that Justice Stevens' opinion identified several important governmental objectives, including the need to ensure reliable proof of paternity, encourage healthy parent-child relationships and foster ties between a foreign-born child and the United States. App. at 8a, 12a (*citing Miller*, 523 U.S. 437-38 (Stevens, J.)). The court also agreed with Justice Stevens that the statute is narrowly tailored to meet these objectives.

Having found § 1409 to be constitutional under Justice Stevens' opinion in *Miller*, notwithstanding the stated

views of a majority of the Court, the Fifth Circuit concluded that Petitioners failed to meet the requirements of that provision, thus rendering Nguyen an alien. Because it found Nguyen to be an alien who has been convicted of an aggravated felony, the court concluded that it lacked jurisdiction and granted the Government's motion to dismiss the petition for review. App. at 13a.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD RESOLVE THE CONFLICT IN THE CIRCUITS CONCERNING THE CONSTITUTIONALITY OF § 1409.

Review by this Court is necessary to resolve a conflict among the circuits on the constitutionality of 8 U.S.C. § 1409, a federal statute governing the conferral of United States citizenship. The court of appeals upheld the relevant provisions of 8 U.S.C. § 1409, based on Justice Stevens' opinion in *Miller* (even though that opinion was joined only by the Chief Justice). *See, e.g.*, App. at 11a-13a. In *United States v. Ahumada-Aguilar*, 189 F.3d 1121 (9th Cir. 1999), the Ninth Circuit reached the opposite result and struck down the relevant portions of § 1409.[5] After analyzing the various decisions in *Miller*, the Ninth Circuit held §1409 to be unconstitutional in light of its understanding that "a majority of the U.S. Supreme Court has effectively so declared," 189 F.3d at 1122, as well as its own independent judgment that the "outdated stereotype"

[5] The Government has filed a petition for *certiorari* in *Ahumada-Aguilar*, citing this split between the Fifth and Ninth Circuits as an important factor weighing in favor of this Court's consideration of the constitutionality of § 1409. *See* Petition for Certiorari at 20-22, *United States v. Ahumada-Aguilar*, 189 F.3d 1121 (9th Cir.), *petition for cert. filed*, (U.S. May 22, 2000) (No. 99-1872) [hereinafter *Ahumada-Aguilar* Petition].

embodied in the statute, "relies on the generalization that mothers are more likely to have close ties to and care for their children than are fathers," and cannot withstand heightened scrutiny. *Id.* at 1126-27.

The conflict could not be more clear. The Fifth and Ninth Circuits have adopted diametrically opposed views on the constitutionality of § 1409. As a result, the nation's laws governing conferral of citizenship at birth lack uniformity and depend upon the place of a person's residence. If Nguyen had resided in a state within the Ninth Circuit's jurisdiction, he would have been accorded citizenship under the decision in *Ahumada-Aguilar*. The existence of different citizenship criteria in the Fifth and Ninth Circuits creates confusion in administration of the law in those circuits as well as other jurisdictions. Clearly, citizenship laws should be uniform across the nation. This intolerable situation necessitates this Court's intervention.

II. THIS CASE IS AN APPROPRIATE VEHICLE FOR DETERMINING THE CONSTITUTIONALITY OF § 1409.

In *Miller*, the Court granted *certiorari* to resolve the constitutionality of § 1409. 523 U.S. 420, 428 (1998). However, the Court failed to render a definitive decision because the father was not a party to the proceeding in this Court and because two Justices found that the petitioner in *Miller* lacked standing to raise the equal protection claim of the citizen father. As a result, *Miller* has not provided clear guidance for the lower courts. *Compare* App. at 9a *with Ahumada-Aguilar*, 189 F.3d at 1125-26. *See also Breyer v. Meissner*, No. 98-1842, 2000 U.S. App. LEXIS 12453 at *20-21 (3d Cir., June 6, 2000) (striking down gender-based classifications in an analogous immigration law provision, while noting that "the precedential value of *Miller* is

unclear"). As explained below, the Court should grant *certiorari* in the present case because here -- unlike *Miller* and *Ahumada-Aguilar* – both the father and the child are parties to this action.

Clearly, the confusion engendered by *Miller* has arisen because the question of standing prevented this Court from reaching a majority holding on the merits. Yet the Government's petition for *certiorari* currently pending in *Ahumada-Aguilar* vigorously asserts that the merits are also beyond the Court's reach in that case. According to the Government, because the citizen father in that case is deceased and had no prior contact with the child who now asserts the father's constitutional rights, no party to the suit has standing to raise the question of § 1409's constitutionality. *Ahumada-Aguilar* Petition, at 10-15. The Government's analysis demonstrates that *Ahumada-Aguilar* is not the proper vehicle for resolving the constitutionality of § 1409 since, the Government asserts, standing issues would once again frustrate this Court from issuing a definitive ruling on the merits. Indeed, in its petition in *Ahumada-Aguilar*, the Government does not even ask the Court, in the first instance, to hear the case on the merits; instead, it seeks a summary reversal on the threshold question of standing. *Id.* at 16.

In this case, by contrast, both the citizen father and the child are before the Court, vigorously defending their rights. Here, the Court need not speculate concerning the desires of a deceased father or a father who is not a party to the action. Further, there can be no question that a citizen father has standing to raise his own equal protection rights in a challenge to § 1409. *See Miller*, 523 U.S. at 447-48 (O'Connor, J., concurring in judgment) (characterizing the Government's argument that the citizen father lacked standing as "misguided"); *accord Lujan v. Defenders of*

Wildlife, 504 U.S. 555, 560-61 (1992) (holding that standing is proper where a party has suffered an "injury in fact"). In short, the question of standing poses no impediment to consideration of the constitutional question presented.[6]

Even in the unlikely event the Court were to conclude that Boulais is not a proper party to this case, Nguyen would have third-party standing to raise his father's rights under the standards applied by all members of the Court in *Miller*, including Justice O'Connor's concurrence. If Boulais is prevented from protecting his interests in this case, the requisite "hindrance" that two Justices found lacking in *Miller* would exist to confer third-party standing on his son. Unlike the father in *Miller*, who failed to appeal his early dismissal from that case, Boulais continues to vigorously assert his own rights. According third-party standing would ensure that Boulais' constitutional rights are considered in the context of *this* proceeding, the outcome of which will have a significant, if not preclusive, impact on Boulais' interests. Moreover, this case easily meets the additional requirement for third-party standing that there be a "close relationship" between Nguyen and his father, given that Boulais raised his son from infancy following the mother's abandonment. In *Ahumada-Aguilar*, the Government challenges the deceased father's standing on the ground that respondent's "only relationship with his father was genetic," and there is no indication that the father would have wished to pursue his own rights. *Ahumada-Aguilar* Petition, at 14. Whatever the validity of that contention, no such obstacle to considering the merits exists in this case.

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[6] The Government objected below to Boulais' participation in this action, but the court of appeals correctly rejected the Government's contention out of hand. App. at 10a, n.6 (noting that the challenged statute "directly implicates a father's rights to confer citizenship on his children").

This Court is now faced with petitions for *certiorari* in two cases presenting conflicting views of the underlying constitutional question in *Miller*. Given the Court's scarce resources, the confusion arising from the absence of a majority holding in *Miller*, and the absence of any obstacles to consideration of the merits here, this case is plainly the appropriate vehicle for resolving that question. Accordingly, the Court should grant *certiorari* in this case, and hold the petition in *Ahumada-Aguilar* for subsequent disposition following a decision on the merits in this case.

III. THE COURT SHOULD GRANT *CERTIORARI* TO ADDRESS THE IMPORTANT QUESTION OF THE CONSTITUTIONALITY OF § 1409.

The question presented in this case -- the constitutionality of § 1409 -- is no less important now than it was when the Court granted *certiorari* to consider it in *Miller*. To the contrary, developments subsequent to *Miller* only underscore the need for the Court to more clearly address this issue.

First, the issue of § 1409's constitutionality is a recurring one. In the short time since *Miller*, at least four cases raising this issue have already made their way to the courts of appeal: *Nguyen*; *Ahumada-Aguilar*; *Terrell v. INS*, 157 F.3d 806 (10th Cir. 1998); and *Lake v. Reno*, No. 99-4125 (2d Cir. argued Mar. 31, 2000).

Second, additional guidance on this issue is clearly warranted. Of the two courts of appeals cases reaching the merits of § 1409's constitutionality since *Miller*, *Ahumada-Aguilar* struck down the relevant portions of the statute, while the *Nguyen* court upheld those provisions. Moreover, in applying strict scrutiny to strike down an analogous

gender-based immigration law applicable to foreign-born children of United States citizens born prior to 1934, the Third Circuit Court of Appeals specifically noted the lack of clear guidance from this Court. *Breyer v. Meissner*, No. 98-1842, 2000 U.S. App. LEXIS 12453, at * 21 (3d Cir., June 6, 2000). Indeed, several members of this Court have acknowledged that, "the fractured decision in *Miller* may demonstrate the need for additional guidance as to the constitutionality of laws differentiating between fathers and mothers of out-of-wedlock children." *See e.g., Rainey v. Chever*, 527 U.S. 1044, 1047 (1999), *denying cert. to* 510 S.E.2d 823 (Ga. 1999) (Thomas, J. dissenting). *See also* Richard G. Wood, *When a Majority Loses on the Merits:* Miller v. Albright *and the Problem of Splintered Judgments*, 29 Seton Hall L. Rev. 816 (1998).

Finally, the question of § 1409's constitutionality presents a substantial question concerning laws based on gender stereotypes. In this regard, the Fifth Circuit's failure to follow the views of a majority of the Justices in *Miller* is particularly troubling. This Court has repeatedly made clear that sex-based stereotyping is an impermissible form of gender discrimination. *See United States v. Virginia*, 518 U.S. 515, 541-46 (1996); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982); *Califano v. Goldfarb*, 430 U.S. 199, 211 (1977) (plurality opinion); *Weinberger v. Weisenfeld*, 420 U.S. 636, 645 (1975). As noted by Justice O'Connor in *Miller*, "it is unlikely" that "gender classifications based on stereotypes can survive heightened scrutiny." 523 U.S. at 452.[7]

[7] A majority of this Court cited heightened scrutiny as the appropriate standard of review in *Miller*. 523 U.S. 440 (Stevens, J.); *id.* at 478 (Breyer, J., dissenting). This issue is more fully addressed in Amicus Brief of the ACLU, et al., *Miller v. Albright*, LEXIS 1996 U.S. Briefs 1060 (1997)(No. 96-1060). *See also* Cornelia T.L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and*

The stereotypes on which § 1409 is based are patently clear. As the Ninth Circuit found in *Ahumada-Aguilar*, "[b]y requiring a U.S. citizen father to agree in writing that he will provide financial support to the child until the child reaches the age of 18, [§1409] (a)(3) presumes that a father will not care for and support his child unless required to do so." 189 F.3d at 1126-27.

Similarly, as Justice Breyer noted in *Miller*, § 1409(a)(4) assumes that a paternity establishment requirement is needed to "mak[e] certain the father knows of the child's existence." 523 U.S. at 485 (Breyer, J., dissenting). However, as Justice Breyer points out (and as is illustrated in this case), "[a] father with strong ties to the child may, simply by lack of knowledge, fail to comply with the statute's formal requirements," while "[a] father with weak ties might readily comply." *Id.* at 485-86.

In *United States v. Virginia*, this Court reaffirmed in the strongest possible terms that gender-based classifications will pass muster under heightened scrutiny only if the government affirmatively advances an "exceedingly persuasive justification." 518 U.S. at 531, 555. The justifications offered by the Government, as set out in *Miller* and recited in the lower court opinion, are insufficient to support this suspect classification. While the Government argues that the requirements of § 1409(a) are essential to administration of citizenship laws, the facts of this case, in which Nguyen has a close bond with his father and no more than a genetic tie to his natural mother, underscore that the criteria are simply based on sex stereotypes relating to men's and women's parenting roles. *See* Amicus Brief of the

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Executive Branch Decision Making in Miller v. Albright, 1998 Sup. Ct. Rev. 1, 18-32.

ACLU at 6-12, *Miller* (No. 96-1060). Review by this Court is necessary to clarify that sex-based stereotypes have no place in our nation's laws, and that such discriminatory stereotypes may not be used to deny the rights of citizens.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 26, 2000

* *Counsel of Record*

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-60418

TUAN ANH NGUYEN; JOSEPH ALFRED BOULAIS,
Petitioners,

versus

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

[Decided: April 17, 2000]

OPINION

Before; POLITZ and STEWART, Circuit Judges, and LITTLE, * District Judge.

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* District Judge of the Western District of Louisiana, sitting by designation.

CARL E. STEWART, Circuit Judge:

Tuan Anh Nguyen ("Nguyen") and Joseph Alfred Boulais ("Boulais") appeal the Board of Immigration Appeals ("BIA") order of deportation entered against Nguyen. For the following reasons we grant the Immigration and Naturalization Service's motion to dismiss the appeal for lack of jurisdiction.

FACTUAL AND PROCEDURAL BACKGROUND

Nguyen was born September 11, 1969 in Vietnam. His mother is a Vietnamese citizen. The co-petitioner, Boulais, is Nguyen's natural father.[1] Nguyen's mother abandoned him at birth. In June 1975, Nguyen was brought to the United States as a refugee becoming a lawful permanent resident pursuant to the Indochinese Refugee Act. Nguyen settled in Texas where he was raised by Boulais. Nguyen never had any subsequent contact with his natural mother.

On August 28, 1992, Nguyen plead guilty in Texas state court to two felony charges of sexual assault on a child. He was sentenced to eight years in prison for each crime. While confined in state prison in Huntsville, Texas, Nguyen was interviewed by an INS agent. He told the agent he was a native and citizen of Vietnam as well as the circumstances surrounding his entry in the United States. Based on this information, the INS began deportation proceedings against Nguyen on April 4, 1995. The INS argued that Nguyen was subject to deportation as an alien who had been convicted of two crimes involving moral turpitude and an aggravated felony under INA § 241(a)(2)(A)(ii)and (iii) (codified at *8* U.S.C. §§ 1251 (a)(2)(A)(ii)-(iii) (1994)).

---

[1] It was established through DNA testing conducted in December 1997 that it is 99.98% certain that Boulais is Nguyen's biological father.

While in state prison in Huntsville, Texas Nguyen appeared at two hearings before an immigration judge. At the first hearing, in November 1996, Nguyen indicated that he wished to challenge the show cause order on the ground that he was a United States citizen. The judge continued the hearing to allow Nguyen time to present proof of his citizenship. At the second hearing in January 1997, his attorney withdrew, and the immigration judge went forward and advised Nguyen of his procedural rights and conducted the hearing. During the colloquy conducted by the immigration judge, Nguyen testified under oath that he was not a citizen of the United States and that he was a citizen of Vietnam. He also admitted that he was convicted of the aforementioned crimes. On the basis of this testimony the immigration judge found that Nguyen was deportable. Nguyen timely appealed the immigration judge's order to the BIA.

While his appeal was pending, Mr. Boulais instituted a paternity proceeding in a Texas district court. In February 1998, based on DNA testing results Boulais obtained an "Order of Parentage" adjudging that he is the father of Nguyen. Since the BIA's briefing schedule called for submission of Nguyen's brief prior to the completion of DNA testing and the issuance of the paternity decree, Nguyen submitted an initial brief to the BIA outlining his United States' citizenship argument, but did not include the DNA evidence to support his claim. On April 15, 1998 he filed a supplemental brief which included the relevant evidence. On June 2, 1998, the BIA dismissed Nguyen's appeal.

On June 26, 1998 Nguyen filed a Motion to Reconsider with the BIA which has not to date been adjudicated. On July 2, 1998 Mr. Boulais and Nguyen filed a habeas petition in the United States District Court, challenging the BIA's deportation order and denial of relief from deportation. The petitioners also filed a request for declaratory judgment as to

the citizenship issue. Because of the multi-layered requests in the district court action, the magistrate judge agreed to hold that matter in abeyance pending this court's decision.[2] The INS has filed a motion to dismiss this appeal for lack of jurisdiction, and this court ruled that the motion should be carried with the case.

DISCUSSION

The Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") of 1996, Pub. L. No. 104-208, § 309(c)(4)(G), 110 Stat. 3009, 626-27, contains the standards for criminal deportees whose deportation proceedings commence before IIRIRA's general effective date of April 1, 1997, and conclude more than thirty days after its passage on September 30, 1996. Section 309(c)(4)(G) provides that there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in section 212(a)(2) or section 241(a)(2)(A)(iii), (B), (C), or (D) of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act), or any offense covered by section 241(a)(2)(A)(ii) of such Act (as in effect on such date) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 241(a)(2)(A)(I) of such Act (as so in effect).

It has been established that this language "completely forecloses our jurisdiction to review decisions of the BIA." *Lerma de Garcia v. INS*, 141 F.3d 215, 216 (5th Cir. 1999) (quoting *Nguyen v. INS*, 117 F.3d 206, 207 (5th Cir.1997)). The petitioners do not contest that Nguyen was convicted of a crime specified in INA § 241(a)(2)(A)(ii), namely crimes involving moral turpitude, and an aggravated felony.

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[2] The pending case is styled as *Nguyen vs. Reno*, Civ. No. H-98-2086 (S.D. Tex., complaint filed July 2, 1998).

If Nguyen is found to be an alien, this court will not have jurisdiction to review the BIA's decision. *See Terrell v. INS*, 157 F.3d 806, 809 (10th Cir. 1998) (concluding that petitioner who was being deported under IIRIRA § 309(c)(4)(g) was not a citizen and therefore the court lacked jurisdiction to review BIA deportation order). Thus, it is a threshold question in the determination of our jurisdiction for this court to determine whether Nguyen is a citizen. *See Okoro v. INS*, 125 F.3d 920, 925 n. 10 (5th Cir. 1997) ("when judicial review depends on a particular fact or legal conclusion, then a court may determine whether that condition exists. The doctrine that a court has jurisdiction to determine its jurisdiction rests on this understanding") (quoting *Yang v. INS*, 109 F.3d 1185, 1192 (7th Cir. 1997)).

INA § 106(a)(5) states:

> Whenever any petitioner, who seeks review of an order under this section, claims to be a national of the United States and makes a showing that his claim is not frivolous, the court shall (A) pass upon the issues presented when it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or (B) where a genuine issue of material fact as to the petitioner's nationality is presented, transfer the proceedings to a United States district court for the district where the petitioner has his residence for hearing de novo of the nationality claim . . .

8 U.S.C. § 1105a (5) (1994).[3] The petitioners argue that because the immigration judge and the BIA did not consider

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[3] 8 U.S.C. § 1105a was repealed in 1996, and succeeded by 8 U.S.C. § 1252(b)(5) which also concludes that if there is no genuine issue of material fact presented as to the petitioner's nationality the court of appeals should decide the issue.

the proof regarding Nguyen's parentage this case should be transferred to the district court for de novo determination of these issue. However, the statute does not require that the BIA or immigration judge have heard this evidence, instead it only requires that no genuine issue of material fact exist. In February 1998, a Texas court entered an "Order of Parentage" which establishes that Boulais is Nguyen's biological father. Therefore, there are no genuine issues of material fact regarding Nguyen's nationality leaving this court to determine whether Nguyen is a citizen of the United States.

I. Citizenship

It has been recognized that there are only two sources of citizenship, birth and naturalization. *Miller v. Albright*, 523 U.S. 420, 423, 118 S. Ct. 1428, 1432, 140 L. Ed. 2d 575 (1998) (citing *United States v. Wong Kim Ark*, 169 U.S. 649, 702, 18 S. Ct. 456, 477, 42 L. Ed. 890 (1898)). Those persons not born in the United States may only acquire citizenship by birth as provided by Acts of Congress. *Miller*, 523 U.S. at 423. Nguyen claims that although born in Vietnam he acquired citizenship at birth under INA § 301. The provision states that:

> The following shall be nationals and citizens of the United States at birth:...(g) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years.

8 U.S.C. § 1401. However, there is an exception to this general provision for children born out of wedlock. INA §

309 states that the aforementioned INA § 301 applies to children born out of wedlock if:

> (a)(1) a blood relationship between the person and the father is established by clear and convincing evidence,
>
> (2) the father had the nationality at the time of the person's birth
>
> (3) the father (unless deceased) has agreed in writing to provide financial support until the person reaches the age of 18 years, and
>
> (4) while the person is under the age of 18 years-
>
> (A) the person is legitimated under the law of the person's residence or domicile,
>
> (B) the father acknowledges paternity of the person in writing under oath, or
>
> (C) the paternity of the person is established by adjudication of a competent court . . .
>
> (c) Notwithstanding the provisions of subsection (a) of this section, a person born...outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of said persons birth, and if the mother had been physically present in the United States or one of its outlying possessions for a continuous period of one year.

8 U.S.C. § 1409. This provision allows for out of wedlock children of citizen mothers to automatic citizenship at birth, while out of wedlock children of citizen fathers cannot establish their citizenship unless the citizen father takes

certain affirmative steps. It is clear that Nguyen has failed to establish the citizenship requirements outlined in INA § 309. Boulais failed to "legitimate" Nguyen before his eighteenth birthday by acknowledging paternity in writing or establishing Nguyen's paternity in a court of competent jurisdiction.

The petitioners argue that although he fails to meet the requirements of INA § 309, that this provision should not be applied because it violates the Fifth Amendment of the United States Constitution which guarantees equal protection under the law. Specifically, petitioners contend that the statute makes it more difficult for male citizens to confer citizenship on their offspring born out of wedlock than for citizen mothers to confer citizenship.

This equal protection argument was addressed by the Supreme Court in *Miller v. Albright, see* 523 U.S. at 423. A plurality opinion authored by Justice Stevens,[4] applying the heightened scrutiny standard which is used in gender bias claims, found that INA § 309 did not violate the equal protection clause. The court found that the statute met several important governmental objectives, including ensuring reliable proof of a biological relationship between the citizen parent and the child, encouraging a healthy relationship between the citizen parent and the child while the child is a minor, and fostering ties between the foreign born child and the United States.

Justice O'Connor concurring in the judgment disagreed with the court's application of the heightened scrutiny standard.[5] *See Id.* at 445-46. Justice O'Connor explained that Miller's father had earlier been wrongly dismissed from the action by the district court and therefore there was no first-

[4] Only Chief Justice Rehnquist concurred in the opinion.

[5] Justice Kennedy joined in Justice O'Connor's Concurrence.

party claim of gender discrimination. *Id.* at 447-48. Therefore, the only way for the court to address the gender discrimination claim would be to allow Miller to represent her father's interest by giving her third party standing. However, Justice O'Connor concludes that Miller could not meet the requirements for third party standing, because there was no substantial hindrance to her father's ability to assert his own rights. *Id.* at 447-48. Therefore, because the alleged equal protection violation implicated the citizen father's rights and not the rights of the child, Miller, as the child, was only entitled to rational basis review of the statute. *Id.* at 451.

The fractured opinions of the Supreme Court in *Miller* demonstrate that we must first address standing in deciding what level of scrutiny to apply to the gender discrimination claim made in this case. The question of standing has been pivotal in recent cases from our sister circuits regarding the constitutionality of INA § 309. *See Terrell*, 157 F.3d at 808 (concluding that petitioner's father was not a party to the suit and petitioner was not entitled to third party standing and therefore the statute should only be reviewed for rational basis); *United States v. Ahumada-Aguilar,* 189 F.3d 1121, 1126 (9th Cir. 1999) (finding third party standing because petitioner's father was deceased, and ultimately finding the statute could not withstand heightened scrutiny).

In the present case we have facts that are in some significant ways distinct from those in *Miller*. Boulais is a petitioner in the present action unlike the fathers in *Miller* and *Terrell*. Boulais was not a party to the proceedings below because the deportation action was brought only against Nguyen. Boulais is also a petitioner in the habeas action which is pending in the district court. Therefore, it is clear that Boulais has made every effort to represent his own interests in the present suit. We find that Boulais should be allowed to represent his own interest in the present action. In *Miller*, Justice O'Connor stated that: "[the father] originally

filed suit and asserted his own rights but then opted not to pursue his claim throughout this litigation. It is true that he was *wrongly* dismissed from the action . . . and that the Government made the misguided argument before that court that 'the rights, if any, which have been injured are those of [the daughter], the true plaintiff in this action'." *See Miller,* 523 U.S. at 448. In the present case, the government also argues that Boulais' rights have not been injured because he is not the party who is to be deported.[6] Based on Justice O'Connor's clear statement in *Miller* regarding this argument, we find the government's position unpersuasive.[7] Boulais is a proper party in this action to challenge the constitutionality of INA § 309.

Having resolved the standing question we will now address the constitutionality of the statute in question. The petitioners argue that INA § 309 is unconstitutional because

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[6] The government cites this court's opinion in *Garcia v. Boldin,* 691 F.2d 1172, 1183 (5th Cir. 1982) for the proposition that families of deportable aliens do not have standing to challenge a deportation order. Unlike this case, in Garcia the family of the deporatable alien was not attempting to challenge a statute which was directed at the rights of the family itself. In the present case INA § 309 directly implicates a father's rights to confer citizenship on his children.

[7] It is also important to note that all of the other seven justices who did not join in Justice O'Connor's concurrence found that even if *Miller*'s father was not a party to the suit *Miller* would have third-party standing to assert her father's challenge to the statute. In the plurality opinion, citing *Craig v. Boren,* 429 U.S. 190, 193-97, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976), Justice Stevens concluded that *Miller*'s claim relied heavily on her citizen father's right to transmit citizenship and thus the court would evaluate the alleged discrimination against him. *See Miller,* 523 U.S. at 432. While Justice Scalia joined by Justice Thomas did not agree with the plurality opinion's reasoning regarding third party standing they also "accept the petitioner's third party standing." *Id.* at 455 n.1. The dissenters also conclude that *Miller* met the requirements for third party standing. *Id.* at 473.

it relies on outdated stereotypes regarding male and female parents. First, the INS contends that as an immigration statute INA § 309 should be reviewed under the "facially legitimate and bona fide reason standard" set forth by the Supreme Court in *Fiallo v. Bell,* 430 U.S. 787, 97 S. Ct. 1473, 52 L. Ed. 2d 50 (1977). In *Fiallo,* the Supreme Court held that an immigration statute that distinguished between "legitimate" and "illegitimate" children of United States citizens in giving preference for immigration status to aliens, met equal protection standards because the distinctions in the statute were based on a "facially legitimate and bona fide reason." *Id.* at 794 (citation omitted). The INS correctly points out that this court has followed *Fiallo* in a number of immigration cases. *See e.g., Rodriguez v. INS,* 9 F.3d 408, 410, 414 (5th Cir. 1993) (applying *Fiallo* limited review standard to alien's claim seeking waiver of deportation under INA § 212(c)); *Matter of Longstaff,* 716 F.2d 1439, 1442-43 (5th Cir. 1983) (applying *Fiallo* limited review standard in deciding alien's claim for naturalization). However, we do not find that *Fiallo* dictates the outcome of the present case. As the plurality opinion in *Miller* points out there are significant differences between INA § 309 which is challenged in the present case, and the INA statute challenged in *Fiallo.* Specifically, the statute in *Fiallo* dealt with the claims of aliens for special immigration preferences for aliens, whereas the petitioner's claim in this case is that he is a citizen. *See Miller,* 523 U.S. at 429 (Stevens, J.). Furthermore, the constitutional challenge in *Fiallo* dealt with statutory distinctions between "illegitimate" and "legitimate" children, an issue which is not presented in this case. *Id.* Therefore, we decline to adopt the *Fiallo* "facially legitimate and bona fide reason" standard in the present case.

The petitioners contend that recent Supreme Court cases have established that statutes which rely on outmoded generalizations about gender cannot survive heightened scrutiny. *See, e.g., United States v. Virginia,* 518 U.S. 515,

540-546, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996). Faced with the serious and complex question of the constitutionality of the statute we take guidance from the most recent reasoning of the Supreme Court on this issue. The plurality opinion in *Miller* offers several important governmental objectives that are met by the INA § 309.[8] First, the plurality opinion found that the statute helps to ensure reliable proof of a biological relationship between the citizen parent and the child. *Miller*, 523 U.S. at 436 (Stevens, J.). For a mother the blood relationship between parent and child is evident. *Id.* The opinion reasons that in the case of fathers it is necessary that affirmative steps are taken to demonstrate the biological relationship. *Id.* The statute allows the father to prove this relationship through fairly uncomplicated methods such as signing a statement of paternity under oath, having paternity adjudicated by a competent court or legitimating the child under the law of the parent's state. These steps must be taken before the child reaches eighteen. The plurality opinion in *Miller* concluded that requiring the steps to be taken before eighteen insures that the information relied upon to establish paternity is reliable. *Id.* at 437-38 (Stevens, J.).

The plurality opinion in *Miller* further found that the statute is also well tailored to meet the important governmental objectives of encouraging healthy parent-child relationships while the child is a minor, and fostering ties between the foreign born child in the United States. Justice Stevens concluded that these objectives need to be encouraged in citizen fathers especially, because in the case

[8] In *Miller*, the plurality opinion only addresses the constitutionality of 8 U.S.C. § 1409(a)(4). *See Miller*, 523 U.S. at 432. The dissent addresses the constitutionality of 8 U.S.C. § 1409(a)(3) and (a)(4). *Id.* at 473 (Breyer, J., dissenting). The present case asks us to address the constitutionality of all of 8 U.S.C. § 1409. Specifically, Boulais did not meet the requirements set forth in 8 U.S.C. § 1409(a)(3) and (a)(4).

of citizen mothers they will already know the child exists and be able to develop bonds with the child from an early age because they will obviously be with the child at its birth. *Id.* at 438. (Stevens, J.). Whereas the unmarried citizen father will not necessarily be present at the birth of the child or even know of the child's existence, making it impossible for the citizen father to develop a healthy relationship with the child. *Id.* By requiring fathers to take affirmative steps to establish paternity the government assures that the father and child will meet and have an opportunity to develop a relationship. *Id.* For the foregoing reasons set forth by the Supreme Court's plurality opinion in *Miller*, we find that INA § 309 is constitutional.

CONCLUSION

Having found INA § 309 to be constitutional, we also find that Nguyen does not meet the criteria for citizenship outlined in 8 U.S.C. § 1401, Boulais did not establish Nguyen's paternity before he reached the age of majority. Although Boulais has now obtained an order of parentage that order was decreed in 1998, and Nguyen was twenty eight years old. Thus, due to Nguyen's status as an alien, under IIRIRA this court is precluded from reviewing the BIA's final deportation order. Thus, we grant the INS's motion to dismiss the appeal.

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals
Falls Church, Virginia 22041

File: A22 083 216-Huntsville Date: May 28, 1999

In re: TUAN ANH NGUYEN

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:
Nancy A. Falgout, Esquire
P.O. Box 7873
Houston, Texas 77270

In a decision dated January 30, 1997, an Immigration Judge found the respondent deportable as charged under sections 241(a)(2)(A)(ii) and (iii) of the Immigration and Nationality Act, 8 U.S.C §§ 1251(a)(2)(A)(ii) and (iii). The Immigration Judge also determined that the respondent was statutorily ineligible for a waiver of inadmissibility under section 212(c) of the Act, 8 U.S.C. § 1182(c). The respondent's appeal was dismissed by this Board on June 2, 1998. On June 26, 1998, the respondent filed a motion to reconsider. The motion will be denied.

A motion to reconsider must state the reasons for reconsideration, be supported by pertinent case precedent,

and be predicated on a legal or factual defect in the most recent decision. See 8 C.F.R. § 3.2(b) (1997); Matter of Cerna, 20 I&N Dec. 399 (BIA 1991). A motion to reconsider requests that the original decision be reexamined in light of additional legal arguments, a change of law, or an argument or aspect of the case that was overlooked. Matter of Cerna, supra.

The respondent seeks by this motion to challenge the finding of deportability, claiming derivative United States citizenship. The respondent maintains his supplemental brief together with evidence submitted with that supplemental brief were not considered by the Board when the June 2, 1998, decision was made. It appears that the supplemental brief and additional evidence were not associated with the record at the time of our decision. The information submitted pertains to the evidence going to the question of the respondent's parentage. The respondent argues in his motion that the statutory framework of rules establishing entitlement to derivative citizenship is unconstitutional, as the standards required for illegitimate children to obtain derivative citizenship from a father differ from the standards required to obtain that status derivatively from the mother. It is further contended that the respondent's citizenship claim could be affected by a case pending before the United States Supreme Court.

The respondent admitted at the deportation hearing that he is a native of Vietnam (Tr. at 9). Having admitted his foreign birth, the respondent is presumed to be an alien. We previously determined that the respondent had failed to provide the Immigration Judge with evidence to support his citizenship claim and had not sustained his burden of going forward with evidence establishing the claim of United States citizenship. See Matter of Velasco, 16 I&N Dec. 281 (BIA 1977). Additionally, subsequent to the filing of the respondent's motion, the Supreme Court issued its decision

in a case upon which the respondent had intended to rely, Miller v. Albright, 523 U.S. 420 (1998). The Supreme Court's decision was not, however, favorable to the respondent, as it held that the different proof requirements for the father, as opposed to the mother, did not represent an unconstitutional denial of equal protection. Thus, the respondent has not demonstrated that our prior decision was in error.

Based on the foregoing, the motion will be denied.

ORDER: The motion is denied.

/s/
FOR THE BOARD

APPENDIX C

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals
Falls Church, Virginia 22041

File: A22 083 216-Huntsville Date: June 02, 1998

In re: TUAN ANH NGUYEN

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Nancy A. Falgout, Esquire
P.O. Box 7873
Houston, Texas 77270

ORDER:

PER CURIAM. We agree with the Immigration Judge that the conviction records submitted in this case establish by clear, unequivocal, and convincing evidence, that you are deportable as charged. See Woodby v. INS, 385 U.S. 276 (1966). No arguments presented during the hearing or on appeal would cause us to disturb this finding.

We note your claim that you are entitled to derivative United States citizenship. We observe that, at your deportation hearing you admitted that you are a native of Vietnam (Tr. at 9). Having admitted your foreign birth, you are presumed to be an alien. However, you failed to provide the Immigration Judge with evidence to support your

citizenship claim. You have not sustained your burden of going forward with evidence establishing your claim of United States citizenship. See Matter of Velasco, 16, I&N Dec. 281 (BIA 1977).

You are seeking relief from deportation under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). However, you are statutorily ineligible for such relief as an "alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offense are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i)." See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA") § 440(d); Matter of Soriano, Interim Decision 3289 (A.G., Feb. 21, 1997).

Additionally, your aggravated felony conviction, for which you were sentenced to a term of imprisonment of 5 years or more, prohibits you from applying for or being granted asylum under section 208(d) of the Act, 8 U.S.C. § 1158(d), and also renders you ineligible for withholding of deportation pursuant to section 243(h)(2)(B) of the Act, 8 U.S.C. § 1253 (h)(2)(B). Matter of Q-T-M-T-, Interim Decision 3300 (BIA 1996).

You also argue that your deportation hearing was unfair because you were not represented by counsel at your hearing. However, the record shows that the Immigration Judge advised you of your right to be represented and granted you a continuance to obtain representation but you failed to do so. Additionally, you have not demonstrated how you were prejudiced by the Immigration Judge's actions. The Immigration Judge properly proceeded with the hearing. See section 292 of the Act, 8 U.S.C. § 1362; 8

C.F.R § 3.16(a); see generally Matter of Madrigal, Interim Decision 3274 (BIA 1996).

Accordingly, your appeal is dismissed.

/s/

FOR THE BOARD

APPENDIX D

U.S. Department Of Justice
Executive Office for Immigration Review
Office of the Immigration Judge

In the Matter of: **Case No.: 22 083 216**

Tuan Anh Nguyen **Docket:Huntsville,TX**

RESPONDENT IN DEPORTATION PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

Upon the basis of respondent's admissions, I have determined that the respondent is deportable on the charge(s) in the Order to Show Cause.

Respondent has made no application for relief from deportation.

It is HEREBY ORDERED that the respondent be deported from the United States to Vietnam on the charge(s) contained in the Order to Show Cause.

It is FURTHER ORDERED that if the aforenamed country advises the Attorney General that it is unwilling to accept the respondent into its territory or fails to advise the Attorney General within three months following original inquiry whether it will or will not accept respondent into its territory, respondent shall be deported to _____.

If you fail to appear for deportation at the time and place ordered by the INS, other than because of exceptional

circumstances beyond your control (such as serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances), you will not be eligible for the following forms relief for a period of five years after the date you were required to appear for deportation:

(1) Voluntary departure as provided for in section 242(b) of the Immigration and Nationality Act;
(2) Suspension of deportation or voluntary departure as provided for in section 244(e) of the Immigration and Nationality Act: and
(3) Adjustment of status or change of status as provided for in section 245, 248 or 249 of the Immigration and Nationality Act.

/s/
Immigration Judge

Date: 30 Jan. 97

Due: 3 March 97
Respondent reserves appeal.
(originally handwritten).

Supreme Court, U.S.
FILED
AUG 23 2000
CLERK

(2)

No. 99-2071

In the Supreme Court of the United States

TUAN ANH NGUYEN AND JOSEPH BOULAIS,
PETITIONERS

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

SETH P. WAXMAN
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12 pp

QUESTION PRESENTED

Under Section 309(a) of the Immigration and Nationality Act, 8 U.S.C. 1409(a), a child born abroad out of wedlock to a father who is a citizen of the United States and a mother who is not a citizen becomes a citizen of the United States, as of his date of birth, only if, *inter alia*, paternity is formally established by legitimation, written acknowledgment, or court decree while the child is under the age of 18, and the father agrees in writing to provide financial support for the child during the child's minority. Section 309(c) of the INA, 8 U.S.C. 1409(c), permits a child born abroad out of wedlock to claim citizenship on the basis of his relation to a citizen mother, so long as the mother had previously been physically present in the United States, before the child's birth, for a continuous period of at least one year. The question presented is as follows:

Whether the requirements for transmission of citizenship imposed upon United States citizen fathers by Section 1409(a) violate the equal protection component of the Due Process Clause.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Discussion	6
Conclusion	9

TABLE OF AUTHORITIES

Cases:

INS v. *Pangilinan*, 486 U.S. 875 (1988)	8
Miller v. *Albright*, 523 U.S. 420 (1998)	2, 8
United States v. *Ahumada-Aguilar*, 189 F.3d 1121 (9th Cir. 1999), petition for cert. pending, No. 99-1872	6-7

Constitution and statutes:

U.S. Const. Amend. V (Due Process Clause)	2, 5
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 309(c)(4)(G), 110 Stat. 3009-626 to 3009-627	4-5
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*:	
§ 241(a)(2)(A)(ii)-(iii), 8 U.S.C. 1251(a)(2)(A)(ii)-(iii)	3
§ 301(c), 8 U.S.C. 1401(c)	2
§ 301(d), 8 U.S.C. 1401(d)	2
§ 301(e), 8 U.S.C. 1401(e)	2
§ 301(g), 8 U.S.C. 1401(g)	2
§ 309(a), 8 U.S.C. 1409(a)	2, 5, 6, 7, 8, 9
§ 309(c), 8 U.S.C. 1409(c)	2

In the Supreme Court of the United States

No. 99-2071

TUAN ANH NGUYEN AND JOSEPH BOULAIS,
PETITIONERS

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 208 F.3d 528. The opinion of the Board of Immigration Appeals on reconsideration (Pet. App. 14a-16a) is unreported. The initial opinion of the Board of Immigration Appeals (Pet. App. 17a-19a) is unreported. The deportation order of the immigration judge (Pet. App. 20a-21a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 2000. The petition for a writ of certiorari was filed on June 26, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 309(a) of the Immigration and Nationality Act (INA), 8 U.S.C. 1409(a), permits a child born outside the United States to unmarried parents to claim United States citizenship on the basis of the child's relation to a United States citizen father, so long as (i) there is "clear and convincing evidence" of a blood relationship between the child and the father, (ii) the father agrees in writing to provide financial support for the child while the child is under the age of 18, and (iii) before the child turns 18 there is some formal legal acknowledgment of paternity, either by legitimation under the laws of the child's residence or domicile, by adjudication of a competent court, or simply by the father's execution of an acknowledgment in writing under oath. The citizen father must also meet a residency requirement imposed through Section 1409(a), by 8 U.S.C. 1401(c), (d), (e), or (g). Section 309(c) of the INA, 8 U.S.C. 1409(c), permits a child born abroad out of wedlock to claim citizenship on the basis of his relation to a United States citizen mother, so long as the mother had previously been physically present in the United States, before the child's birth, for a continuous period of at least one year.

2. In *Miller* v. *Albright*, 523 U.S. 420 (1998), this Court considered, but failed definitively to resolve, the question whether Section 1409(a) violates the equal protection component of the Due Process Clause of the Fifth Amendment. Two Members of the Court concluded that Section 1409(a) does not violate the equal protection rights of either the child or the citizen father. See *id.* at 432-445 (opinion of Stevens, J.). Two Justices agreed that the statute does not violate the child's equal protection rights. *Id.* at 451-452 (O'Connor, J., concurring in the judgment). Those Justices declined to consider whether the statute unconstitutionally discriminates against citizen fathers, since the father involved in that case had abandoned his equal protection claim and was not a party in this Court, and the child did not, in the view of those Justices, have third-party standing to raise the father's equal protection rights. *Id.* at 445-451. Two Justices declined to address the constitutional claim of either the father or the child on the ground that the Court would lack power to confer citizenship as a remedy even if the statute were held to be unconstitutional. *Id.* at 452-459 (Scalia, J., concurring in the judgment). Three Justices would have held that the statute is unconstitutional. *Id.* at 461-471 (Ginsburg, J., dissenting); *id.* at 471-490 (Breyer, J., dissenting).

3. Petitioner Tuan Anh Nguyen was born in South Vietnam on September 11, 1969. His mother, a Vietnamese citizen, abandoned him at birth. His natural father is petitioner Joseph Alfred Boulais, an American citizen. In June 1975, Nguyen came to the United States as a refugee, and he subsequently became a lawful permanent resident. He was raised in Texas by Boulais. Pet. App. 2a.

On August 28, 1992, Nguyen pleaded guilty in Texas state court to two felony charges of sexual assault on a child, and he was sentenced to eight years in prison for each crime. The Immigration and Naturalization Service (INS) subsequently initiated deportation proceedings against him. The gravamen of the deportation charges was that Nguyen was deportable under 8 U.S.C. 1251(a)(2)(A)(ii)-(iii) as an alien who had been convicted of two crimes involving moral turpitude, as well as an aggravated felony. Pet. App. 2a.

In the course of the deportation proceedings, Nguyen sought to challenge the show cause order on the ground that he is a United States citizen. He ultimately testified under oath, however, that he was not a citizen of the United States, but a citizen of Vietnam, and he admitted that he was convicted of the aforementioned crimes. The immigration judge found Nguyen to be deportable, and Nguyen appealed to the Board of Immigration Appeals (BIA). Pet. App. 3a.

While the BIA appeal was pending, petitioner Boulais instituted a paternity proceeding in a Texas state court. Pet. App. 3a. In February 1998, he obtained an "Order of Parentage" (based upon DNA test results) adjudging him to be Nguyen's father. *Ibid.* The BIA nevertheless dismissed his appeal (*id.* at 17a-19a), explaining that Nguyen had "failed to provide the Immigration Judge with evidence to support [his] citizenship claim," *id.* at 17a-18a. The BIA subsequently denied Nguyen's motion for reconsideration, relying in part on this Court's decision in *Miller*. *Id.* at 14a-16a.

4. Petitioners Nguyen and Boulais sought review of the BIA's decision in the court of appeals.[1] The INS moved to dismiss petitioners' appeal for lack of jurisdiction. The INS relied on Section 309(c)(4)(G) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-626 to 3009-627, which provides that "there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed" specified criminal offenses. See Pet. App. 4a. The court of appeals granted the government's motion to dismiss the petition for review. *Id.* at 1a-13a.

[1] Petitioners also filed a habeas corpus petition in the United States District Court for the Southern District of Texas, which was held in abeyance pending the court of appeals' decision. Pet. App. 4a & n.2.

The court of appeals stated that because there was no dispute that Nguyen had been convicted of crimes covered by IIRIRA § 309(c)(4)(G), the court would lack jurisdiction over the appeal if Nguyen were in fact an alien. Pet. App. 4a-5a. The court therefore held that the "determin[ation] whether Nguyen is a citizen" was "a threshold question in the determination of [the court's] jurisdiction." *Id.* at 5a. The court of appeals treated the state court's "Order of Parentage" as conclusively "establishing[ing] that Boulais is Nguyen's biological father." *Id.* at 6a. The court found on that basis that "there [we]re no genuine issues of material fact regarding Nguyen's nationality leaving this court to determine whether Nguyen is a citizen of the United States." *Ibid.*

The court of appeals found it "clear that Nguyen has failed to establish the citizenship requirements outlined in" 8 U.S.C. 1409, since "Boulais failed to 'legitimate' Nguyen before his eighteenth birthday by acknowledging paternity in writing or establishing Nguyen's paternity in a court of competent jurisdiction." Pet. App. 8a. The court therefore addressed petitioners' contention that the requirements of 8 U.S.C. 1409(a) should not be applied to Nguyen's claim of citizenship on the ground that Section 1409(a) violates the equal protection component of the Due Process Clause. In analyzing the constitutional issue, the court considered the impact of the statutory scheme both on Nguyen and on Boulais. The court explained that Boulais—unlike the father in *Miller*—had "made every effort to represent his own interests in the present suit" and

therefore "should be allowed to represent his own interest in the present action." Pet. App. 9a.

On the merits, principally for the reasons stated in Justice Stevens's opinion in *Miller*, the court of appeals held that Section 1409(a) is constitutional. Pet. App. 11a-13a. The court explained that the statute "helps to ensure reliable proof of a biological relationship between the citizen parent and the child," and is "well tailored to meet the important governmental objectives of encouraging healthy parent-child relationships while the child is a minor, and fostering ties between the foreign born child [and] the United States." *Id.* at 12a. Having rejected petitioners' constitutional challenge to Section 1409(a), the court concluded that "Nguyen does not meet the [statutory] criteria for citizenship" and that his petition for review of the deportation order should be dismissed. *Id.* at 13a. The court explained that

> Boulais did not establish Nguyen's paternity before he reached the age of majority. Although Boulais has now obtained an order of parentage that order was decreed in 1998, and Nguyen was twenty eight years old. Thus, due to Nguyen's status as an alien, under IIRIRA this court is precluded from reviewing the BIA's final deportation order. Thus, we grant the INS's motion to dismiss the appeal.

Ibid.

DISCUSSION

The Fifth Circuit in this case upheld Section 1409(a) against petitioners' equal protection challenge. That decision is correct. As petitioners explain (Pet. 10-11), however, the Fifth Circuit's ruling squarely conflicts with the Ninth Circuit's decision in *United States* v. *Ahumada-Aguilar*, 189 F.3d 1121, 1125-1127 (1999), petition for cert. pending, No. 99-1872, which held that Section 1409(a) violates the equal protection rights of citizen fathers. We agree with petitioners that the constitutional issue warrants review by this Court, in view of the circuit conflict on the issue and the recurring nature of the question.[2]

The government has filed a petition for a writ of certiorari in *Ahumada-Aguilar*.[3] In our view, however, the instant case provides a better vehicle for ultimate resolution of the constitutional issue by this Court. *Ahumada-Aguilar* (like *Miller*) presents the threshold question whether an individual who bases his claim to citizenship on a constitutional challenge to Section 1409(a) may assert the equal protection rights of his father. Although the Ninth Circuit held that Ahumada-Aguilar had third-party standing to assert his father's rights because the father is deceased, see 189 F.3d at 1126, our petition in that case explains (at 10-16) why that holding is erroneous. Thus, while we believe that the Ninth Circuit's decision in *Ahumada-Aguilar* warrants reversal by this Court, we do not believe that the equal protection claim brought on behalf of the citizen father is properly presented in that case.

We suggested in our certiorari petition in *Ahumada-Aguilar* that the Court might wish to consider summary reversal of the judgment of the Ninth Circuit in that case on third-party standing grounds. We explained that summary reversal on that ground would

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[2] The Second Circuit has not yet rendered its decision in *Lake* v. *Reno*, No. 99-4125 (argued Mar. 31, 2000), which, as petitioners note (Pet. 14), presents the same issue.

[3] We are furnishing petitioners' counsel with copies of the petition and reply brief filed by the government in *Ahumada-Aguilar*.

eliminate the Ninth Circuit's judgment holding an Act of Congress unconstitutional, the circuit conflict on the constitutional issue, and the prospect that the Court would grant plenary review due to the Ninth Circuit's constitutional ruling only to find itself precluded from reaching that issue because of the threshold standing obstacle. See 99-1872 Pet. at 16-17, 22, 23. The instant case, by contrast, presents no third-party standing issue, because the father whose equal protection rights are alleged to have been violated was a party in the court of appeals and is a petitioner in this Court. We therefore believe it would be appropriate for the Court to grant certiorari in this case and to hold our petition in *Ahumada-Aguilar* pending the Court's decision in this case.[4]

[4] The government does not dispute that petitioner Boulais is petitioner Nguyen's natural father, or that Boulais's equal protection rights may properly be resolved in this case. We note that, if the Court were to find 8 U.S.C. 1409(a) unconstitutional, it would need to decide a remedial question presented but not resolved in *Miller*—*i.e.*, whether a court has the power to declare petitioner Nguyen to be a citizen of the United States despite the absence of a statute conferring citizenship. Compare *Miller*, 523 U.S. at 452-459 (Scalia, J., concurring in the judgment) (concluding that a court lacks the power to confer citizenship on a foreign-born individual in the absence of a statute that provides for citizenship, even as a remedy for a constitutional infirmity in the citizenship statute itself), with *id.* at 445 n.26 (opinion of Stevens, J.) (noting but not reaching remedial issue); *id.* at 451 (O'Connor, J., concurring in the judgment) (citing Justice Scalia's opinion and acknowledging the "potential problems with fashioning a remedy"); *id.* at 488-490 (Breyer, J., dissenting) (concluding that the Court may appropriately declare the plaintiff to be a citizen). See also *INS* v. *Pangilinan*, 486 U.S. 875, 885 (1988) (where Congress has set specific statutory limits on a provision for naturalization, "[n]either by application of the doctrine of estoppel, nor by invocation of equitable powers, nor by any other means does a court have the power to confer citizenship in violation of [those] limitations"). That remedial issue, however, will presumably be implicated by every constitutional challenge to Section 1409(a).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DAVID W. OGDEN
Assistant Attorney General

MICHAEL JAY SINGER
JOHN S. KOPPEL
Attorneys

AUGUST 2000

Supreme Court, U.S.
FILED
NOV 13
CLERK

No. 99-2071

In The

Supreme Court of the United States

TUAN ANH NGUYEN AND
JOSEPH ALFRED BOULAIS,

Petitioners,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

JOINT APPENDIX

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Petition For Writ Of Certiorari Filed: June 26, 2000
Certiorari Granted: September 26, 2000

31PP

TABLE OF CONTENTS

Docket Entries:
Board of Immigration Appeals 1
United States Court of Appeals for the Fifth Circuit 3

Certification of Birth, Joseph Byron Alfred Boulais 6

Armed Forces of the United States, Report of Transfer or Discharge 7

Social Security Administration, Summary of FICA Earnings, JB Boulais 14

Methodist Hospital, Paternity Testing Results, Mr. Joe Alfred Boulais 15

District Court, Harris County, Texas, Petitioner's Supporting Affidavit 20

District Court, Harris County, Texas, 311th Judicial District, Order of Parentage 22

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

A 22 083 216

Matter of Tuan Anh Nguyen, Respondent
in Deportation Proceedings

Chronology of Relevant Pleadings, Hearings and Orders

DATE	PROCEEDINGS
04/04/95	ORDER TO SHOW CAUSE issued by Immigration and Naturalization Service (INS), instituting deportation proceedings against Appellant Tuan Anh Nguyen.
01/30/97	HEARING before Immigration Judge Jimmie Benton. ORDER of deportation to Vietnam issued.
02/27/97	NOTICE OF APPEAL filed with Board of Immigration Appeals (BIA) by Tuan Anh Nguyen.
08/08/97	BRIEF filed by Appellee INS.
08/20/97	BRIEF filed by Appellant Tuan Anh Nguyen.
04/17/98	SUPPLEMENTAL BRIEF and Motion to Hold Deportation Proceedings in Abeyance filed by Appellant Tuan Anh Nguyen.

06/02/98 ORDER filed. Decision: Appeal dismissed.

06/26/98 MOTION to Reconsider filed by Appellant Tuan Anh Nguyen.

05/28/99 ORDER filed. Decision: Appellant Tuan Anh Nguyen's Motion to Reconsider denied.

UNITED STATES COURT OF APPEALS
FIFTH JUDICIAL CIRCUIT

No. 98-60418

Tuan Anh Nguyen and Joseph Boulais, Petitioners
v.
Immigration and Naturalization Service,
Respondent

DOCKET ENTRIES

DATE	PROCEEDINGS
07/01/98	PETITION FOR REVIEW filed by Petitioner Tuan Anh Nguyen, Petitioner Joseph Alfred Boulais.
07/01/98	MOTION filed by Petitioner Tuan Anh Nguyen for stay of deportation (incorporated into petition for review).
07/02/98	NOTICE filed by Petitioner Tuan Anh Nguyen of intent to deport Tuan Anh Nguyen.
07/15/98	ORDER filed granting petitioner Tuan Anh Nguyen's unopposed motion for stay of deportation pending review.
08/31/98	MOTION filed by Respondent INS to dismiss petition for lack of jurisdiction and to "hold briefing in abeyance pending disposition of motion to dismiss".

09/14/98 RESPONSE/OPPOSITION filed by Petitioners Tuan Anh Nguyen and Joseph Alfred Boulais to motion to dismiss.

09/21/98 REPLY filed by Respondent INS to response/ opposition by Petitioners Tuan Anh Nguyen and Joseph Alfred Boulais

09/23/98 REPLY filed by Petitioners Tuan Anh Nguyen and Joseph Alfred Boulais to reply by Respondent INS to response/opposition of petitioners to motion to dismiss.

01/12/99 BRIEF filed by Petitioners Tuan Anh Nguyen and Joseph Alfred Boulais.

03/08/99 BRIEF filed by Respondent INS.

03/23/99 REPLY BRIEF filed by Petitioners Tuan Anh Nguyen and Joseph Alfred Boulais.

06/23/99 SUPPLEMENTAL AUTHORITIES filed by Petitioners Tuan Anh Nguyen and Joseph Alfred Boulais.

07/16/99 LETTER of Respondent INS filed, requesting that footnote 14 on page 16 of its brief be withdrawn.

09/08/99 SUPPLEMENTAL AUTHORITIES filed by Respondent INS.

10/06/99 SUPPLEMENTAL AUTHORITIES filed by Petitioners Tuan Anh Nguyen and Joseph Alfred Boulais.

10/07/99 ORAL ARGUMENT heard.

01/17/00 SUPPLEMENTAL AUTHORITIES filed by Petitioners Tuan Anh Nguyen and Joseph Alfred Boulais.

04/17/00 ORDER filed granting Respondent INS' motion to dismiss appeal for lack of jurisdiction.

04/17/00 JUDGEMENT entered and filed.

06/09/00 MANDATE issued.

CERTIFICATION OF BIRTH
JOSEPH BYRON ALFRED BOULAIS

CERTIFICATION OF BIRTH
Connecticut State Department of Health

Public Health Statistics Section,
Hartford, Connecticut, U.S.A

Registration No. None

Name Joseph Byron Alfred Boulais

Date of Birth June 21, 1937 Sex Male

Place of Birth Hartford

Reg. Date 6/24/37 Date Issued 12/27/74

This is a true certification of Name and Birth Facts
(remainder unreadable)

Attest /s/
Douglas Lloyd, M.D. Commissioner

STATE OF CONNECTICUT

ARMED FORCES OF THE UNITED STATES
REPORT OF TRANSFER OR DISCHARGE
DD FORM 1 NOV 55 214
REPLACED EDITION OF 1 JUL 52 WHICH IS OBSOLETE.
(originally on bottom of document)

PERSONAL DATA

1. LAST NAME-FIRST NAME-MIDDLE NAME

   BOULAIS, JOSEPH BYRON ALFRED

2. SERVICE NUMBER
   RA 19 654 080

3. a. GRADE RATE OR RANK
   [text unreadable] E-4 (T)

   b. DATE OF RANK (day, month, year)
   2 Jul 62

4. DEPARTMENT, COMPONENT, AND BRANCH OR CLASS
   ARMY-RA-ARTY

5. PLACE OF BIRTH (CITY AND STATE OR COUNTRY)
   Hartford, Connecticut

6. DATE OF BIRTH
   DAY-MONTH-YEAR
   21 Jun 37

7. a. RACE
Caucasian

b. SEX
Male

c. COLOR HAIR
Brown

d. COLOR EYES
Brown

e. HEIGHT
5'11"

f. WEIGHT
165

8. U.S. CITIZEN
✖ YES
❑ NO

9. MARITAL STATUS
Single

10. a. HIGHEST CIVILIAN EDUCATION LEVEL ATTAINED
12 years

b. MAJOR COURSE OR FIELD
Academic

TRANSFER OR DISCHARGE DATA

11. a. TYPE OF TRANSFER OR DISCHARGE
Transferred To USAR (See 18)

b. STATION OR INSTALLATION AT WHICH EFFECTED
Fliegerhorst Kaserne, Hanau, Germany

c. EFFECTIVE DATE
DAY-MONTH-YEAR
24 Jan 63

12. LAST DUTY ASSIGNMENT AND MAJOR COMMAND
Btry B. 2d How Bn. 75th Arty, USAREUR

13. a. CHARACTER OF SERVICE
HONORABLE

b. TYPE OF CERTIFICATE ISSUED
NONE

SELECTIVE SERVICE DATA

14. SELECTIVE SERVICE NUMBER
43 3 37 80

15. SELECTIVE SERVICE LOCAL BOARD NUMBER CITY, COUNTY AND STATE
L.B. #3, St. Johnsbury, Caledonia Co., California

16. DATE INDUCTED
DAY-MONTH-YEAR
25 Jan 60

17. DISTRICT OR AREA COMMAND TO WHICH RESERVIST TRANSFERRED

USAR Con GP (Stand By) USAREUR, AFO 403, New York, New York

SERVICE DATA

18. TERMINAL DATE OF RESERVE OBLIGATION
DAY-MONTH-YEAR
24 Jan 66

19. CURRENT ACTIVE SERVICE OTHER THAN BY INDUCTION

a. SOURCE OF ENTRY
✖ ENLISTED (first enrollment)
❑ ENLISTED (prior service)
❑ REENLISTED
❑ OTHER

b. TERM OF SERVICE (years)
3

c. DATE OF ENTRY
DAY-MONTH-YEAR
25 Jan 60

20. PRIOR REGULAR ENLISTMENTS
NONE

21. GRADE, RATE OR RANK AT TIME OF ENTRY INTO CURRENT ACTIVE SERVICE
Rct. E-1

22. PLACE OF ENTRY INTO CURRENT ACTIVE SERVICE (City and State)
Los Angeles, California

23. HOME OF RECORD AT TIME OF ENTRY INTO ACTIVE SERVICE
(Street, RFD, City, County, and State)
10659 Daines Dr., Temple City, Los Angeles Co., California

24. STATEMENT OF SERVICE
a. CREDITABLE FOR BASIC PAY PURPOSES
(1) NET SERVICE THIS PERIOD
YEARS-3, MONTHS-0, DAYS-0

(2) OTHER SERVICE
YEARS-0, MONTHS-0, DAYS-0

(3) TOTAL [original text unclear]
YEARS-3, MONTHS-0, DAYS-0

b. TOTAL ACTIVE SERVICE
YEARS-3, MONTHS-0, DAYS-0

c. FOREIGN AND OTHER SEA SERVICE
YEARS-2, MONTHS-7, DAYS-4

26. DECORATIONS, MEDALS, BADGES, COMMENDATIONS, CITATIONS AND CAMPAIGN RIBBONS AWARDED OR AUTHORIZED
Expert (M-14, Rifle)
Drivers Badge, w/Bar

27. WOUNDS RECEIVED AS A RESULT OF ACTION WITH ENEMY FORCES (Place and Date, if known)
NONE

28. SERVICE SCHOOLS OR COLLEGES, COLLEGE TRAINING COURSES AND/OR POST-GRADUATE COURSES SUCCESSFULLY COMPLETED
SCHOOL OR COURSE-NONE
DATES-NA
MAJOR COURSES-NA

29. OTHER SERVICE TRAINING COURSES SUCCESSFULLY COMPLETED
Code of Conduct
Mil Justice

VA DATA

30. a. GOVERNMENT LIFE INSURANCE IN FORCE
❑ YES
✖ NO

b. AMOUNT OF ALLOTMENT
NA

c. MONTH ALLOTMENT DISCONTINUED
NA

31. a. VA BENEFITS PREVIOUSLY APPLIED FOR (specify type)
NONE

b. VA CLAIM NUMBER
NA

AUTHENTICATION

32. REMARKS

BLOOD GROUP: A
SSAN; 342-34-5386
Lump sum payment made for 57 days accrued leave
Item 3a: PFC E-3 (P), DOR: 10 Oct 60,
Date of Apt: 10 Oct 61

33. PERMANENT ADDRESS FOR MAILING PURPOSES AFTER TRANSFER OR DISCHARGE
[unreadable]
Wolcott, Vermont

34. SIGNATURE OF PERSON BEING TRANSFERRED OR DISCHARGED

/S/

35. a. TYPED NAME, GRADE AND TITLE OF AUTHORIZING OFFICER
L.B. PRICE, CWO, W-3, Pers Officer

b. SIGNATURE OF OFFICER AUTHORIZED TO SIGN

/S/

SOCIAL SECURITY ADMINISTRATION
SUMMARY OF FICA EARNINGS
FOR YEAR REQUESTED

SEQY DTE: 02/24/98 AN: 342-34-5386 DOC: 856
UNIT: BJS MEF: QN: 342-34-5386 NA: J B BOULAI
DB: 06/1937 SX: M AK

SUMMARY FICA EARNINGS FOR YEAR REQUESTED

Year	Earnings	Year	Earnings	Year	Earnings	Year	Earnings
1958	2167.12	1966	6600.00	1974	11775.99	1982	32400.00
1959	3147.21	1967	13057.51	1975	14843.58	1983	30702.87
1960	1250.40	1968	7800.00	1976	.00	1984	26680.07
1961	1192.44	1969	7800.00	1977	.00	1985	13257.75
1962	1499.43	1970	7800.00	1978	.00	1986	32026.04
1963	120.00	1971	7800.00	1979	22900.00	1987	29278.35
1964	.00	1972	9000.03	1980	25900.00	1988	2559.30
1965	.00	1973	10800.00	1981	29700.00		

SOCIAL SECURITY ADMINISTRATION
10810 EASTEX FREEWAY
HOUSTON, TX 77093

THE METHODIST HOSPITAL
PATERNITY TESTING RESULTS
MR. JOE ALFRED BOULAIS

THE METHODIST HOSPITAL

6565 FANNIN STREET
HOUSTON, TX. 77030-2707
(713) 790-3311

CONFIDENTIAL

December 16, 1997

Mr. Joe Alfred Boulais

Re: Paternity Testing of Mr. Joe Alfred Boulais, alleged father, and Tuan A. Nguyen, adult child.

Cause No. 97 44500; In the Matter of Tuan Anh Nguyen; In the 311th Judicial District Court of Harris County

Dear Mr. Boulais:

Blood was drawn for paternity testing from the two individuals mentioned above at The Methodist Hospital, 6565 Fannin Street, Houston, Texas. The results of ABO, HLA and DNA system tests are listed on the enclosed sheets.

Applying the recognized laws of genetics to these results we can state that these results are consistent with Mr. Joe Alfred Boulais being the biological father of the adult child, Tuan A. Nguyen. Mr. Joe Alfred Boulais is not excluded in any of the marker systems tested. Probabilities for paternity can be calculated in each marker system by calculating the comparative likelihood that he could produce an offspring

with this phenotype with a random woman of the same ethnic group in relation to the likelihood that a random man and random woman could produce an offspring with this phenotype.

Assuming a prior probability of 50%, the combined probability for paternity is 99.98%. 99.94% of falsely accused men would be excluded as the father by the above tests.

Should you have any further questions or comments regarding this case, please feel free to contact me.

I hereby certify that the enclosed report is an exact copy of the original report on file in my laboratory, that is an AABB Parentage Testing Committee Accredited Laboratory, and that I have been fully responsible for all test results reported and all interpretations made.

Sincerely,

/s/

David H. Yawn, M.D.
Medical Director
The Methodist Hospital
HLA Laboratory
6565 Fannin, F 501
Houston, Texas 77030
(713) 790-3127

DHY/dlk
Enclosures: as stated
oc: 311th Harris County Judicial District Court
xc: Tuan A. Nguyen, Adult Child
Elizabeth M. Mendoza, Attorney at Law

SUBSCRIBED AND SWORN TO BEFORE ME on this the 10 day of December 1997

/s/

Notary Public in and for The State of Texas

The Methodist Hospital
Histocompatibility and Clinical Immunology Laboratory
Parentage Testing Report

16 Dec 97

RE paternity test results on :

		Lab No.	Race	Blood Drawn
Mother			O	
Child	Tuan A. Nguyen	27722		03 Dec 97
Alleged Father	Joe Alfred Boulais	27550	W	22 Oct 97

System	Mother	Child	Alleged Father	Paternity Index
ABO	?	A	A	1.54
HLA	?	A 3, 24 B 14,46	A 1,3 B 8, 14	63.54
D7S104 pS194/ PST 1	?	6.73	6.73	5.42
D2S44 pYNH24/HAEIII	?	1.41 2.91	2.02 2.91	7.16
D21S112 pL427/PST 1	?	1.59 1.94	1.59 1.87	1.45

Joe Alfred Boulais can not be excluded as the father of Tuan A. Nguyen. The combined paternity index (genetic odds in favor of paternity) is 5,516. The relative chance of paternity, assuming a 50% prior chance, is 99.98%.

99.94% of falsely accused men would be excluded as the father by the above tests.

/s/
David H. Yawn, MD
Medical Director

NO. _____

IN THE MATTER OF	)	IN THE DISTRICT COURT
TUAN ANH NGUYEN	)	OF HARRIS COUNTY, TEXAS
	)	JUDICIAL DISTRICT

PETITIONERS SUPPORTING AFFIDAVIT

Before me, the undersigned authority, personally appeared JOSEPH BYRON ALFRED BOULAIS, who by me duly sworn, deposed as follows:

"My name is JOSEPH BYRON ALFRED BOULAIS. I am over the age of 18 years and of sound mind and capable of making this affidavit. I am personally acquainted with the facts herein stated, which are true.

I am the Petitioner in the above-entitled and numbered cause.

I acknowledge that I am the biological father of Tuan Anh Nguyen. I met his mother in 1969 in Vietnam. At the time I was working on Pacific Architect Engineer throughout Southeast Asia. His mother and I had a relationship and the result of that was our son Tuan. Soon after Tuan's birth, my relationship with his mother soured and the baby went to live with the family of my new girlfriend, who also was Vietnamese.

When Saigon fell, I lost total contact with Tuan's mother. I really don't know if she is dead or alive. My son escaped Vietnam with my girlfriend's family and they went to the Philippines. In 1975, I brought my son to the US and I

have raised him. To this day my son nor I have any idea what happened to his mother.

I want to fix my son's immigration papers and to do that I need to legally establish that I am Tuan's father. The US Immigration and Naturalization Service wants genetic testing done before they will believe that I am Tuan's father. That is why I am filing this paternity case.

If I knew where Tuan's mother was or how to get in touch with her I would have done so by now. I harbor no ill will against her. I simply do not know anything about her and haven't for the past twenty years.

I do not have any knowledge of the residence and/or present address of Tuan's mother. I have exercised due diligence to locate the whereabouts of this party and have been unable to do so."

/s/
Joseph Byron Alfred Boulais\ Petitioner, Affiant

Subscribed and sworn to me under oath on August 19, 1997.

/s/
Notary Public for the State of Texas

My commission expires: 09-16-2000

NO. 97-44500

IN THE MATTER OF	)	IN THE DISTRICT COURT OF
	)	HARRIS COUNTY, TEXAS
TUAN ANH NGUYEN	)	311TH JUDICIAL DISTRICT

ORDER OF PARENTAGE

I. DATE OF HEARING

On February 3, 1998 the Court heard this case.

II. APPEARANCES

Joseph Boulais, Petitioner, appeared in person and through attorney of record, Elizabeth M. Mendoza, and announced ready for trial.

Nguyen Thi Hong, Respondent, although duly and properly cited, did not appear and wholly made default.

An Ad Litem Attorney was not requested nor appointed by the Court.

The following person waived issuance and service of citation by waiver duly filed and did not otherwise appear: Tuan Anh Nguyen.

III. JURISDICTION

The Court, after examining the record and hearing the evidence and argument of counsel, finds that it has jurisdiction of this case and of all the parties and that no other court has continuing, exclusive jurisdiction of this case. All persons entitled to citation were properly cited.

IV. JURY

A jury was waived, and all questions of fact and law were submitted to the Court.

V. RECORD

The making of a record of testimony was made by the official Court Reporter. (handwritten words unreadable in original)

VI. ADULT

The Court finds that the following child, now an adult, is the subject of this suit:

Name:	Tuan Anh Nguyen
Sex:	Male
Birthplace	Saigon, Vietnam
Birthdate:	September 11, 1969
Present residence:	Incarcerated at: Ferguson Unit Rt. 2, Box 20 Midway, Texas 75852 Prisoner ID# 63 93 94

VII. STATEMENT OF PATERNITY

The Court finds that Joseph Boulais has executed s [sic] statement of paternity for the child the subject of this suit in form and substance as provided by law, that a copy of the statement has been filed in this case, and that the facts recited in the statement are true.

VII. PARENTAGE ESTABLISHED

The Court, after considering the pleadings, the evidence, the argument of counsel, and the circumstances of the parties and of the child, finds that the following orders are in the best interest of the child and are proper.

IT IS ORDERED that Tuan Anh Nguyen, a child to Nguyen Thi Hung at Saigon, Vietnam on September 11, 1969 is adjudicated the child of Joseph Boulais and that Joseph Boulais is adjudicated a parent of that child and that the parent-child relationship exists between the father and the child for all purposes.

IX. DECLARATION OF NAME

IT IS ORDERED that the child formerly known as Tuan Anh Nguyen shall hereafter be named Tuan Anh Boulais.

X. INFORMATION REGARDING PARTIES AND CHILD

The information required for each party by section 105.006(a) of the Texas Family Code is as follows:

Name:	Thi Hung Nguyen
Social Security number:	Unknown
Driver's license number and issuing date:	Unknown
Current residence address:	Unknown
Mailing address:	Unknown
Home telephone number:	Unknown
Name of employer:	Unknown
Address of employment:	Unknown
Work telephone number:	Unknown
Name:	Joseph Boulais
Social security number:	342 34 5386
Driver's license number and issuing state:	040 29 522; Texas
Current residence address:	13525 Aldine Westfield, Houston, TX 77039
Mailing address:	Same as above
Home telephone number:	281-442-7969
Name of employer:	Boulais Mobile Home Park
Address of employment:	12619 Chrisman Road Houston, Texas. 77039
Work telephone number:	281-442-7969
Name:	Tuan Anh Nguyen
Social security number:	None
Driver's license number and issuing state:	None
Current residence address:	Ferguson Unit Rt. 2, Box 20 Midway, Texas 75852 Prisoner ID # 63 93 94
Mailing address:	Same as above

Home telephone number:	None
Name of employer:	None
Address of employment:	None
Work telephone number:	None

XI. REQUIRED NOTICES

EACH PERSON WHO IS A PARTY TO THIS ORDER IS ORDERED TO NOTIFY EACH OTHER PARTY [AND THE CLERK OF THIS COURT] WITHIN 10 DAYS AFTER THE DATE OF ANY CHANGE IN THE PARTY'S CURRENT RESIDENCE ADDRESS, MAILING ADDRESS, HOME TELEPHONE NUMBER, NAME OF EMPLOYER, ADDRESS OF EMPLOYMENT, AND WORK TELEPHONE NUMBER. THE PARTY IS ORDERED TO GIVE NOTICE OF AN INTENDED CHANGE IN ANY OF THE REQUIRED INFORMATION TO EACH OTHER PARTY ON OR BEFORE THE 60TH DAY BEFORE THE INTENDED CHANGE. IF THE PARTY DOES NOT KNOW OR COULD NOT HAVE KNOWN OF THE CHANGE IN SUFFICIENT TIME TO PROVIDE 60-DAY NOTICE, THE PARTY IS ORDERED TO GIVE NOTICE OF THE CHANGE ON OR BEFORE THE FIFTH DAY AFTER THE DATE THAT THE PARTY KNOWS OF THE CHANGE.

THE DUTY TO FURNISH THIS INFORMATION TO EACH OTHER PARTY [AND THE CLERK OF THE COURT] CONTINUES AS LONG AS ANY PERSON, BY VIRTUE OF THIS ORDER, IS UNDER AN OBLIGATION TO PAY CHILD SUPPORT OR ENTITLED TO POSSESSION OF OR ACCESS TO A CHILD.

FAILURE BY A PARTY TO OBEY THE ORDER OF THIS COURT TO PROVIDE EACH OTHER PARTY [AND THE CLERK OF THIS COURT] WITH THE CHANGE IN THE REQUIRED INFORMATION MAY RESULT IN FURTHER LITIGATION TO ENFORCE THE ORDER, INCLUDING CONTEMPT OF COURT. A FINDING OF CONTEMPT MAY BE PUNISHED BY CONFINEMENT IN JAIL FOR UP TO SIX MONTHS, A FINE OF UP TO $500 FOR EACH VIOLATION, AND A MONEY JUDGMENT FOR PAYMENT OF ATTORNEY'S FEES AND COURT COSTS.

Notice shall be given to the other party by delivering a copy of the notice to the party by registered or certified mail, return receipt requested. [Notice shall be given to the Court by delivering a copy of the notice either in person to the clerk of the Court or by registered or certified mail addressed to the clerk.]

XII. WARNINGS TO PARTIES

WARNINGS TO PARTIES: FAILURE TO OBEY A COURT ORDER FOR CHILD SUPPORT OR FOR POSSESSION OF OR ACCESS TO A CHILD MAY RESULT IN FURTHER LITIGATION TO ENFORCE THE ORDER, INCLUDING CONTEMPT OF COURT. A FINDING OF CONTEMPT MAY BE PUNISHED BY CONFINEMENT IN JAIL FOR UP TO SIX MONTHS, A FINE OF UP TO $500 FOR EACH VIOLATION, AND A MONEY JUDGMENT FOR PAYMENT OF ATTORNEY'S FEES AND COURT COSTS.

FAILURE OF A PARTY TO MAKE A CHILD SUPPORT PAYMENT TO THE PLACE AND IN THE MANNER REQUIRED BY A COURT ORDER MAY

RESULT IN THE PARTY'S NOT RECEIVING CREDIT FOR MAKING THE PAYMENT.

FAILURE OF A PARTY TO PAY CHILD SUPPORT DOES NOT JUSTIFY DENYING THAT PARTY COURT-ORDERED POSSESSION OF OR ACCESS TO A CHILD. REFUSAL BY A PARTY TO ALLOW POSSESSION OF OR ACCESS TO A CHILD DOES NOT JUSTIFY FAILURE TO PAY COURT-ORDERED CHILD SUPPORT TO THAT PARTY.

XIII. COSTS

IT IS ORDERED that the costs of court are to be borne by the party who incurred them.

XIV. RELIEF NOT GRANTED

IT IS ORDERED that all relief requested in this case and not expressly granted is denied.

XV. DATE OF ORDER

SIGNED on Feb. 4th, 1998

/s/
JUDGE PRESIDING

XVI. APPROVALS

APPROVED AND CONSENTED TO AS TO BOTH FORM AND SUBSTANCE:

/s/
PETITIONER

APPROVED AS TO FORM ONLY:

/s/
Elizabeth M. Mendoza
Attorney for Petitioner
9894 Bissonnet, Ste. 310
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Dec 13, 2000

Supreme Court, U.S.
FILED
DEC 13 2000
OFFICE OF THE CLERK

No. 99-2071

In the Supreme Court of the United States

TUAN AHN NGUYEN AND JOSEPH BOULAIS,
PETITIONERS

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Section 1409(a) of Title 8 of the United States Code provides for the conferral of United States citizenship upon a child who is born out of wedlock outside the United States and whose father is a United States citizen. The question in this case is whether certain conditions Congress placed on the conferral of citizenship on such a child under Section 1409(a) violate the equal protection component of the Due Process Clause of the Fifth Amendment.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional and statutory provisions involved	1
Statement	1
Summary of argument	7
Argument:	
I. The distinctions in Section 1409 do not violate the equal protection component of the Due Process Clause	11
A. Congress tailored the provisions of Section 1409 to reflect the special circumstances of children born out of wedlock, and to address the problem of statelessness	11
B. Section 1409(a) must be upheld if it reflects a "facially legitimate and bona fide" policy choice by Congress	21
C. Section 1409 effectively serves Congress's valid objectives	31
II. Even if the distinctions drawn by Section 1409 were unconstitutional, Nguyen would not be eligible for citizenship	45
Conclusion	50
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Afroyim v. *Rusk*, 387 U.S. 253 (1967)	49
Blessing v. *Freestone*, 520 U.S. 329 91997)	45
Caban v. *Mohammed*, 441 U.S. 380 (1979)	34, 37
Carter v. *Carter Coal Co.*, 298 U.S. 238 (1936)	46
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Cases—Continued: Page

Clark v. *Jeter*, 486 U.S. 456 (1988) 38
EEOC v. *Arabian Am. Oil Co.*, 499 U.S. 244 (1991) 30
Fiallo v. *Bell*, 430 U.S. 787 (1977) 9, 25, 26, 39, 42
Fong Yue Ting v. *United States*, 149 U.S. 698 (1893) 23-24, 25
Galvan v. *Press*, 347 U.S. 522 (1954) 25
Gomez v. *Perez*, 409 U.S. 535 (1973) 33
Harisiades v. *Shaughnessy*, 342 U.S. 580 (1952) 24, 25
Heckler v. *Mathews*, 465 U.S. 728 (1984) 47, 48
INS v. *Pangilinan*, 486 U.S. 875 (1988) 48
Kawakita v. *United States*, 343 U.S. 717 (1952) 30
Kleindienst v. *Mandel*, 408 U.S. 753 (1972) 25, 26
Lake v. *Reno*, 226 F.3d 141 (2d Cir. 2000), petition for cert. pending, No. 00-963 ..... 7, 41
Lalli v. *Lalli*, 439 U.S. 259 (1978) 43-44
Lehr v. *Robertson*, 463 U.S. 248 (1983) 10, 16, 34, 37, 38, 40, 42, 43, 44
Mathews v. *Diaz*, 426 U.S. 67 (1976) 4, 25, 26
Miller v. *Albright*, 523 U.S. 420 (1998) ..... *passim*
Minor v. *Happersett*, 88 U.S. (21 Wall.) 162 (1874) 29
Mississippi Band of Choctaw Indians v. *Holyfield*, 490 U.S. 30 (1989) 36
Mississippi Univ. for Women v. *Hogan*, 458 U.S. 718 (1982) 44
Nishimura Ekiu v. *United States*, 142 U.S. 651 (1892) 25
Oceanic Steam Navigation Co. v. *Stranahan*, 214 U.S. 320 (1909) 25
Parham v. *Hughes*, 441 U.S. 347 (1979) 38, 43, 44
Perez v. *Brownell*, 356 U.S. 44 (1958) 28, 30
Plyler v. *Doe*, 457 U.S. 202 (1982) 24
Powers v. *Ohio*, 499 U.S. 400 (1991) 31
Quilloin v. *Walcott*, 434 U.S. 246 (1978) 17, 43, 47

Cases—Continued: Page

Reno v. *ACLU*, 521 U.S. 1044 (1999) 46
Rivera v. *Minnich*, 483 U.S. 574 (1987) 33
Rogers v. *Bellei*, 401 U.S. 815 (1971) ..... *passim*
Rostker v. *Goldberg*, 453 U.S. 57 (1981) 44
Schlesinger v. *Ballard*, 419 U.S. 498 (1975) 39
Schneiderman v. *United States*, 320 U.S. 118 (1943) 42
Scott v. *Sandford*, 60 U.S. (19 How.) 393 (1857) 22
Shaughnessy v. *Mezei*, 345 U.S. 206 (1953) 24
Spraigue v. *Thompson*, 118 U.S. 90 (1886) 46
Trop v. *Dulles*, 356 U.S. 86 (1958) 18, 42
United States v. *Ahumada-Aguilar*, 189 F.3d 1121 (9th Cir. 1999), petition for cert. pending, No. 99-1872 ..... 7, 41
United States v. *Ginsberg*, 243 U.S. 472 (1917) 23, 48
United States v. *Jackson*, 390 U.S. 570 (1968) 46
United States v. *Verdugo-Urquidez*, 494 U.S. 259 (1990) 23
United States v. *Virginia* 518 U.S. 515 (1996) 44
United States v. *Wong Kim Ark*, 169 U.S. 649 (1898) 11, 22, 23, 27, 28, 29

Constitutions and statutes:

U.S. Const.:
Art. I, § 8, Cl. 4 ..... 1-2, 9, 22, 1a
Amend. I 26
Amend. V (Due Process Clause) 3, 7, 9, 26, 1a
Amend. XIV 18, 21, 22, 23, 27, 29
§ 1 (Equal Protection Clause) 2, 22, 27, 37, 1a
Philippine Const. Art. IV, §§ 1-4 (1987) 36
Act of Mar. 26, 1790, ch. 3, 1 Stat. 104 12
Act of May 24, 1934, ch. 344, 48 Stat. 797 12
Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631 39

Statutes—Continued: Page

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Immigration and Nationality Act, ch. 477, 66 Stat. 163 (8 U.S.C. 1101 *et seq.*):
8 U.S.C. 1101 6
8 U.S.C. 1101(a) 28
8 U.S.C. 1101(a)(23) 28
8 U.S.C. 1105a(a)(5) 32
8 U.S.C. 1153 25
8 U.S.C. 1227(a)(2)(A)(ii) (Supp. IV 1998) 5
8 U.S.C. 1227(a)(2)(A)(iii) (Supp. IV 1998) 5
8 U.S.C. 1251(a)(2)(A)(ii) 5
8 U.S.C. 1251(a)(2)(A)(iii) 5
8 U.S.C. 1401 ..... 2, 32, 33, 34, 35, 38, 42, 44, 1a
8 U.S.C. 1401(a) 2, 1a
8 U.S.C. 1401(b) 2, 22, 2a
8 U.S.C. 1401(c) (§ 301(c), 66 Stat. 236) 2, 14, 49, 2a
8 U.S.C. 1401(d) 2, 2a
8 U.S.C. 1401(e) 2, 2a
8 U.S.C. 1401(f) 2a
8 U.S.C. 1401(g) (§ 301(a)(7), 66 Stat. 236) 2, 15, 47, 49, 3a
8 U.S.C. 1401(h) 12, 3a
8 U.S.C. 1409 (1952) 5a
8 U.S.C. 1409 ..... *passim*
8 U.S.C. 1409(a) (1982) 32
8 U.S.C. 1409(a) (§ 309(a), 66 Stat. 238) ..... *passim*
8 U.S.C. 1409(a)(1) 2, 21, 29, 31, 32, 4a
8 U.S.C. 1409(a)(2) 2, 4a
8 U.S.C. 1409(a)(3) 2, 4, 21, 29, 32, 33, 46, 47, 4a
8 U.S.C. 1409(a)(4) ..... *passim*
8 U.S.C. 1409(a)(4)(A) 4a
8 U.S.C. 1409(a)(4)(B) 20, 39, 4a
8 U.S.C. 1409(a)(4)(C) 4a

Statutes—Continued: Page

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8 U.S.C. 1423-1424 40
8 U.S.C. 1427 (1994 & Supp. IV 1998) 40
8 U.S.C. 1430 40
8 U.S.C. 1431-1432 39
Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, 100 Stat. 3655 32
Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, Tit. I, § 101(a)(2), 108 Stat. 4306 12
Immigration Technical Corrections Act of 1988, Pub. L. No. 100-525, 102 Stat. 2609:
§ 8(k), 102 Stat. 2617-2618 20
§ 8(r), 102 Stat. 2618-2619 32
Nationality Act of 1940, ch. 876, 54 Stat. 1137:
§ 201, 54 Stat. 1138 ..... 15, 16, 17
§ 201, 54 Stat. 1138-1139 35
§ 201(c), 54 Stat. 1138 14
§ 201(g), 54 Stat. 1139 15
§ 205, 54 Stat. 1139-1140 ..... 15, 16, 17, 18, 19, 6a
42 U.S.C. 666(a)(5) (Supp. IV 1998) 38, 45
Ala. Code:
§ 26-11-2 (1992) 45
§ 43-8-48 (1991) 45
Ark. Code Ann. § 28-9-209 (Michie 1987) 45
Conn. Gen. Stat. Ann. § 45a-438b (West 1993 & Supp. 2000) 45
Del. Code Ann.:
Tit. 12, § 508 (1995) 45
Tit. 13 (1999):
§ 1301 45
§ 1304 45
Idaho Code § 15-2-109 (1979) 45
La. Rev. Stat. Ann. § 9:392 (West 2000) 45

Statutes—Continued: Page

Me. Rev. Stat. Ann. tit. 18-A, § 2-109 (West 1998) 45
Miss. Code Ann. § 91-1-15 (1999) 45
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Neb. Rev. Stat. § 30-2309(2) (1995) 45
S.C. Code Ann. § 62-2-109 (Law. Co-op. 1987 & Supp. 1999) 45
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§ 47 36
§ 50(9) 36
Decree of the Government on Civil Registration (Vietnam)(1998):
Art. 19 36
Art. 47 36
Nationality Law of Vietnam, art. 17 (1998) 36
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Philippine Family Code tit. VI (1998) 36
Staatsangehoerigkeitsgesetz (Germany) § 1, para. 4 36
Thai Nationality Act of 1992 (as amended):
§ 7(1) 36
§ 10 36

Miscellaneous:

Administration of the Immigration and Nationality Laws: Hearing Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary, 99th Cong., 2d Sess. (1986) 20, 21, 31-32, 33, 35, 36, 37
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Miscellaneous—Continued: Page

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Frederick Van Dyne, *Citizenship of the United States* (1904) 18

In the Supreme Court of the United States

No. 99-2071

TUAN AHN NGUYEN AND JOSEPH BOULAIS,
PETITIONERS

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 208 F.3d 528. The opinions of the Board of Immigration Appeals (Pet. App. 14a-16a, 17a-19a) are unreported. The order of the immigration judge (Pet. App. 20a-21a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 2000. The petition for a writ of certiorari was filed on June 26, 2000, and granted on September 26, 2000. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are set out in an appendix to this brief. App., *infra*, 1a-6a.

STATEMENT

1. Article I of the Constitution assigns to Congress the "Power * * * To establish an uniform Rule of Naturalization * * * throughout the United States." U.S. Const. Art.

I, § 8, Cl. 4. In the exercise of that power, Congress has afforded certain classes of persons United States citizenship by statute. In relevant part, 8 U.S.C. 1401 grants United States citizenship at birth to: persons born in the United States, 8 U.S.C. 1401(a) and (b), who in most cases are guaranteed citizenship under Section 1 of the Fourteenth Amendment; persons born outside the United States to parents who are citizens of the United States, if one parent meets a residency requirement, 8 U.S.C. 1401(c); persons born outside the United States to a citizen parent who meets a requirement of physical presence in the United States, where the other parent is a non-citizen national of the United States, 8 U.S.C 1401(d); persons born in a possession of the United States to a citizen parent who meets a physical-presence requirement, 8 U.S.C. 1401(e); and persons born outside the United States to a citizen parent who meets a physical-presence requirement, and a non-citizen parent, 8 U.S.C. 1401(g).

The provisions of 8 U.S.C. 1401 that apply to persons born outside the United States provide for the conferral of citizenship when the parents were married at the time of the birth. Section 1409 of Title 8 establishes provisions applicable to children born outside the United States to unmarried parents.[1] Section 1409(a) allows a claim of citizenship based upon the father's ties to the United States. A child born outside the United States to an unmarried American father, and who otherwise satisfies the requirements for citizenship under subsections (c), (d), (e), or (g) of Section 1401, is deemed a citizen "as of the date of birth" if, but only if: there is clear and convincing evidence of a blood relationship between the child and the father, 8 U.S.C. 1409(a)(1); the father had United States nationality at the time of the child's

[1] We use the terms "unmarried" and "unwed" to describe the status of parents who were not married to each other as of the date of their child's birth, regardless of either parent's actual marital status.

birth, 8 U.S.C. 1409(a)(2);[2] the father (if living) has agreed in writing to provide financial support for the child until the child is 18 years old, 8 U.S.C. 1409(a)(3); and, before the child turns 18, the child is legitimated under the law of his or her residence or domicile, the father acknowledges paternity of the child in writing under oath, or the paternity of the child is established by adjudication by a court of competent jurisdiction, 8 U.S.C. 1409(a)(4).

Section 1409(c) allows a child born abroad out of wedlock to claim citizenship based upon the mother's United States citizenship. In order for a child to become a United States citizen under Section 1409(c), the mother must have been a citizen of the United States at the time of the child's birth, and the mother must have been physically present in the United States (or a United States possession), before the child's birth, for a continuous period of at least one year. 8 U.S.C. 1409(c).

2. In *Miller* v. *Albright*, 523 U.S. 420 (1998), this Court considered, but failed definitively to resolve, the question whether Section 1409(a)'s prerequisites for conferring citizenship on a child on the basis of the United States citizenship of the child's unmarried father are consistent with the equal protection component of the Due Process Clause of the Fifth Amendment. Two Members of the Court concluded that the citizenship requirements of Section 1409(a), which the petitioning child did not satisfy, do not violate the equal protection rights of either the child or the citizen father. See *id.* at 429-445 (opinion of Stevens, J.). Those Justices noted that "[d]eference to the political branches dictates 'a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization,'"

[2] The statutory distinction between "nationality" and "citizenship" "has little practical impact today" because there are few nationals of the United States who are not citizens. *Miller* v. *Albright*, 523 U.S. 420, 467 n.2 (1998) (Ginsburg, J., dissenting).

but held that the requirements of Section 1409(a) are, in any event, "substantially related to important governmental objectives." *Id.* at 434-435 n.11 (quoting *Mathews* v. *Diaz*, 426 U.S. 67, 82 (1976)). Two other Justices agreed that Section 1409(a) does not violate the child's equal protection rights. *Id.* at 451-452 (O'Connor, J., concurring in the judgment). Those concurring Justices declined to consider whether Section 1409(a) unconstitutionally discriminates against United States citizen fathers, because the petitioner's father had abandoned his own equal protection claim in the litigation and was not a party before this Court, and the child did not, in the view of those Justices, have third-party standing to raise the father's equal protection rights. *Id.* at 445-451. Two Justices declined to address the constitutional claim of either the father or the child, on the ground that the Court would lack power to confer citizenship on the child as a remedy even if Section 1409 were held unconstitutional. *Id.* at 452-459 (Scalia, J., concurring in the judgment).[3] Three Justices would have held that Section 1409 draws an impermissible distinction between unwed citizen fathers and unwed citizen mothers, and thus denies unwed citizen fathers equal protection. *Id.* at 460-471 (Ginsburg, J., dissenting); *id.* at 471-490 (Breyer, J., dissenting). Those Justices would have further held that the Court could remedy that violation by striking what they found to be the offending provisions (paragraphs (3) and (4)) from Section 1409(a) and thereby providing for the child to be a citizen if she satisfied the remaining requirements. *Id.* at 488-490 (Breyer, J., dissenting).

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[3] Justice Stevens and Justice O'Connor noted the remedial issue discussed in Justice Scalia's opinion but did not address it in light of their concurrence in the disposition on other grounds. See 523 U.S. at 445 n.26 (opinion of Stevens, J.); *id.* at 451 (O'Connor, J., concurring in the judgment).

3. The lead petitioner in this case, Tuan Ahn Nguyen, was born in Vietnam on September 11, 1969. Pet. Br. 4; Pet. App. 2a. Co-petitioner Joseph Boulais is Nguyen's father and a United States citizen by birth. Pet. App. 2a & n.1; J.A. 6, 8. Nguyen's mother is a Vietnamese citizen. Pet. App. 2a. Boulais and Nguyen's mother never married. Pet. Br. 4; J.A. 20. When Boulais and Nguyen's mother ended their relationship, Nguyen went to live with the family of Boulais's new Vietnamese girlfriend. J.A. 20. In June 1975, Nguyen came to the United States as a refugee, and he subsequently became a lawful permanent resident. Pet. App. 2a. Boulais thereafter raised Nguyen in Texas. *Ibid.*

In 1992, when Nguyen was 22 years old, he pleaded guilty in Texas state court to two felony charges of sexual assault on a child. Nguyen was sentenced to eight years in prison for each crime. Pet. App. 2a.

In 1995, the Immigration and Naturalization Service initiated deportation proceedings against Nguyen on the ground that he was deportable as an alien who had been convicted of two crimes involving moral turpitude, as well as an aggravated felony. Pet. App. 2a. See 8 U.S.C. 1227(a)(2)(A)(ii) and (iii) (Supp. IV 1998) (formerly codified at 8 U.S.C. 1251(a)(2)(A)(ii) and (iii) (1994)). Nguyen challenged deportation, alleging that he is a United States citizen. Pet. App. 3a. Nguyen testified at his deportation hearing, however, that he was a citizen of Vietnam, not the United States. Nguyen also did not dispute the sexual assault convictions that had triggered the deportation proceedings. *Ibid.* The immigration judge accordingly found Nguyen to be deportable. *Id.* at 20a.

Nguyen appealed to the Board of Immigration Appeals (Board). Pet. App. 3a. In 1998, while that appeal was pending, petitioner Boulais obtained an order of parentage (based upon DNA test results and other evidence, see J.A. 7-21) adjudging him to be Nguyen's father. Pet. App. 3a; J.A. 22-

29. The Board dismissed Nguyen's appeal, Pet. App. 17a-19a, and denied his motion to reconsider, *id.* at 14a-16a. In rejecting Nguyen's claim of United States citizenship, the Board relied upon Nguyen's failure to provide the immigration judge with evidence to support his claim of citizenship under Section 1409(a), as well as this Court's judgment against the petitioner in *Miller*. *Id.* at 15a-16a, 17a-18a.

4. The court of appeals held that it lacked jurisdiction over the ensuing petition for review filed by Nguyen and Boulais.[4] The court of appeals relied upon Section 309(c)(4)(G) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-626 to 3009-627, which provides that "there shall be no appeal [from a decision of the Board] permitted in the case of an alien who is inadmissible or deportable by reason of having committed" specified criminal offenses. See 8 U.S.C. 1101 note; Pet. App. 4a. The court of appeals stated that because there was no dispute that Nguyen had been convicted of crimes covered by that statute's jurisdictional bar, it would lack jurisdiction over the appeal if Nguyen is an alien. *Id.* at 4a-5a. Whether Nguyen is an alien, or instead a citizen of the United States, therefore was "a threshold question" in determining the court's jurisdiction. *Id.* at 5a.

The court of appeals treated the Texas state court's order of parentage as conclusive proof that Boulais is Nguyen's biological father. Pet. App. 6a. Nguyen, however, "clear[ly] * * * failed to establish the citizenship requirements outlined in [Section 1409(a)]" because he obtained a legal confirmation of Boulais's paternity when he was 28, rather

[4] In addition to their petition for review of the Board's decision, Nguyen and Boulais filed a habeas corpus petition and request for a declaratory judgment in the United States District Court for the Southern District of Texas. That habeas petition was held in abeyance pending the court of appeals' decision. Pet. App. 3a-4a & n.2.

than before turning 18, as required by Section 1409(a)(4). *Id.* at 8a, 13a.

The court therefore addressed petitioners' contention that the requirements of Section 1409(a) should not be applied because they violate the equal protection component of the Due Process Clause of the Fifth Amendment. In analyzing the constitutional issue, the court considered the impact of the statutory scheme on both the child (Nguyen) and the father (Boulais). The court explained that Boulais—unlike the father in *Miller*—had "made every effort to represent his own interests in the present suit" and therefore should be allowed to do so. Pet. App. 9a. But on the merits, the court of appeals held that Section 1409(a) is constitutional, for the reasons stated in Justice Stevens's opinion in *Miller*. *Id.* at 11a-13a. Accordingly, having rejected petitioners' constitutional challenge to Section 1409(a), the court concluded that Nguyen secured legal proof of Boulais's paternity ten years too late to meet the statutory deadline, and that petitioners' challenge to the deportation order should be dismissed. *Id.* at 13a.[5]

SUMMARY OF ARGUMENT

I. A. Section 1409 is the product of careful congressional consideration in 1940, 1952, and 1986. In 1940, Congress determined that it is appropriate to have different criteria for granting citizenship to children who are born abroad to a

[5] The Second and Ninth Circuits have read *Miller* differently. See *United States* v. *Ahumada-Aguilar*, 189 F.3d 1121 (9th Cir. 1999), petition for cert. pending, No. 99-1872; *Lake* v. *Reno*, 226 F.3d 141 (2d Cir. 2000), petition for cert. pending, No. 00-963. In both cases, the court of appeals held that because the citizen-father of the child seeking citizenship was deceased, the child had third-party standing to assert the father's rights. Extrapolating from the opinions in *Miller*, both courts of appeals were of the view that, in that situation, Justices O'Connor and Kennedy would join Justices Souter, Ginsburg, and Breyer in finding Section 1409(a) unconstitutional. See *Ahumada-Aguilar*, 189 F.3d at 1126; *Lake*, 226 F.3d at 147.

United States citizen father out of wedlock, rather than in a marriage. Congress's distinction between children born out of wedlock and children born in a marriage—which petitioners do not challenge—reflects a legislative judgment that children who have no formal relationship with their United States citizen father are less likely to be raised as Americans. Accordingly, Congress adopted an additional requirement that the unwed father put himself in the same legal position as a married father, by legitimating the child or obtaining an adjudication of paternity, in order to be treated equally with a married father for purposes of rendering a child eligible for citizenship.

Congress also found special requirements appropriate in the case of unwed citizen mothers. Here, Congress relied upon evidence that the foreign-born children of unwed citizen mothers might become stateless if they were not eligible for United States citizenship, because the children would not be eligible for citizenship in their country of birth or in the country of the unwed father. Congress addressed that danger by defining a particularly broad class of citizen mothers whose foreign-born children are statutory citizens at birth.

In 1952 and 1986, Congress made the requirements for acquiring citizenship through an unwed citizen mother somewhat more restrictive, but made the requirements for acquiring citizenship through an unwed citizen father more generous. In particular, Congress offered unwed citizen fathers a new option, whereby they can render their child eligible for citizenship without taking the steps (such as marrying the child's mother) necessary to legitimate the child under the laws of some jurisdictions. In sum, Congress drew reasonable distinctions between married and unmarried fathers in 1940, and thereafter amended the provisions to benefit unwed citizen fathers, such as petitioner Boulais, and their foreign-born children, such as petitioner Nguyen.

B. The legislative judgments embodied in Section 1409 lie at the core of Congress's power to grant naturalized citizenship. That power is textually committed to Congress in Article I, Section 8, Clause 4 of the Constitution. Its exercise involves political decisions about who should share in the privileges, protections, and duties of citizenship, and implicates questions of national security and foreign policy. "[O]ver no conceivable subject is the legislative power of Congress more complete." *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977). This Court's cases, moreover, establish that deference is due to Congress's judgments about who should be eligible for statutory citizenship, notwithstanding that a citizenship statute may implicate the constitutional rights of current citizens (*id.* at 792-795), and that Congress may have chosen to convey citizenship on persons as of their birth (see *Rogers* v. *Bellei*, 401 U.S. 815, 830 (1971)).

C. The narrow issue presented by this as-applied challenge to Section 1409 is whether Section 1409(a)(4)—which requires a citizen father seeking citizenship for his foreign-born child to legitimate the child, acknowledge the child under oath, or be adjudicated the father before the child reaches age 18—discriminates against fathers on the basis of gender in violation of the equal protection component of the Due Process Clause of the Fifth Amendment. There is no violation, as the distinction between unwed citizen fathers and unwed citizen mothers appropriately reflects important and enduring legislative concerns.

It remains the case that children born abroad out of wedlock to a United States citizen mother and a non-citizen father, unlike children born abroad to a United States citizen father and a non-citizen mother, would often be stateless if United States citizenship were not granted liberally. Section 1409(c) addresses that concern. And it remains the case that an unwed father typically will have no legally recognized parental rights or responsibilities toward his child, and will

not be similarly situated to an unwed mother or a married father, unless he takes steps to formalize the paternal relationship. Section 1409(a) establishes reasonable steps an unwed father must take to equalize his status with that of an unwed mother or a married father, for purposes of rendering a foreign-born child eligible for citizenship. In the domestic context, this Court has held that legislatures may require unwed fathers to establish a formal relationship with the child as a condition of being treated on an equal plane with the mother or a married father. *Lehr* v. *Robertson*, 463 U.S. 248 (1983). Such a requirement is particularly permissible when, as here, it is established in the context of a naturalization statute and does not impose a substantial burden on the father.

II. Even if this Court were to determine that Section 1409's distinction between unwed fathers and unwed mothers is not constitutional, petitioners still would not be entitled to the relief they seek. Congress manifestly intended that children born abroad out of wedlock would be treated differently, for citizenship purposes, than children born abroad to married parents. The permissibility of that distinction is undisputed. Accordingly, the remedial question in this case would be whether the terms applicable to unwed fathers and unwed mothers should be equalized by making unwed fathers eligible for the same preference as unwed mothers under Section 1409(c), notwithstanding that the rationale of avoiding statelessness does not apply, or whether the Court should strike down Section 1409(a) and (c) entirely or, alternatively, subject unwed citizen mothers to the same requirements as unwed citizen fathers under Section 1409(a) (neither of which would afford petitioners relief). If it were necessary to choose between those remedies, the appropriate course would be to deny unwed mothers their current preference. Vitiating Congress's preconditions for obtaining citizenship through an unwed

United States citizen father would intrude unnecessarily upon Congress's exclusive authority to define eligibility for naturalized citizenship, create an irrational statutory scheme, and result in judicially mandated grants of citizenship that Congress may be powerless to reverse.

ARGUMENT

I. THE DISTINCTIONS IN SECTION 1409 DO NOT VIOLATE THE EQUAL PROTECTION COMPONENT OF THE DUE PROCESS CLAUSE

The naturalization rules set out in Section 1409 serve at least two important interests: first, ensuring that children who are born abroad out of wedlock have, during their minority, attained a sufficiently recognized or formal relationship to their United States citizen parent—and thus to the United States—to justify the conferral of citizenship upon them; and second, preventing such children from being stateless.[6] Rather than relying upon outmoded stereotypes, Congress has revised Section 1409 over the years to accomplish those purposes in light of current law in the United States and abroad and to promote gender equality, without unnecessarily disadvantaging any group of citizens or would-be citizens.

A. Congress Tailored The Provisions Of Section 1409 To Reflect The Special Circumstances Of Children Born Out Of Wedlock, And To Address The Problem Of Statelessness

1. Congress has provided "by successive acts," beginning with the Act of March 26, 1790, "for the admission to citizenship of * * * [f]oreign-born children of American citizens, coming within the definitions prescribed by Congress." *United States* v. *Wong Kim Ark*, 169 U.S. 649, 672 (1898).

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[6] The United States relied upon those same purposes as respondent in *Miller* v. *Albright*. See 96-1060 Resp. Br. at 24-31 (establishment of formal ties to parent and nation), 33-34 (statelessness).

The first Act of Congress relating to foreign-born children provided that "the children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural-born citizens: *Provided*, That the right of citizenship shall not descend to persons whose fathers have never been resident in the United States." Act of Mar. 26, 1790, ch. 3, 1 Stat. 104. The proviso served to ensure that generations of children born abroad were not to become "citizens" by virtue of a mere blood relationship, unaccompanied by any other tie to this country. That principle persisted in similar statutes of 1795, 1802, 1855, and 1874. See *Bellei*, 401 U.S. at 823-825 (describing history).

Until 1934, those laws extended citizenship to foreign-born children based upon the United States citizenship of their father. In 1934, however, Congress eliminated that distinction between children of citizen fathers and children of citizen mothers, providing instead, on a prospective basis, that any child "whose father or mother or both * * * is a citizen" would be a citizen, if (1) at least one citizen parent satisfied a requirement of residency in the United States before the child's birth, and (2) the child, if born to one citizen parent and one non-citizen parent, satisfied a residency requirement and took an oath of allegiance. Act of May 24, 1934, ch. 344, § 1, 48 Stat. 797 (*reprinted in Bellei*, 401 U.S. at 818 n.2).[7]

2. Before 1940, none of the laws granting citizenship to foreign-born children had addressed the issue of children born out of wedlock. The 1874 and 1934 Acts were interpreted and applied for many years to afford citizenship

[7] In 1994, Congress eliminated the distinction for children born prior to the effective date of the 1934 Act. See 8 U.S.C. 1401(h) (conferring citizenship on children of a citizen mother who meets a residency requirement, if the child was born abroad prior to May 24, 1934), as added by Pub. L. No. 103-416, Tit. I, § 101(a)(2), 108 Stat. 4306.

to children born out of wedlock who had a United States citizen father, if the child subsequently was legitimated by marriage of the father to the child's mother or otherwise in accordance with the governing state or foreign law. See *To Revise and Codify the Nationality Laws of the United States Into a Comprehensive Nationality Code: Hearings Before the House Comm. on Immigration and Naturalization*, 76th Cong., 1st Sess. 431 (printed 1945) (*1940 Hearings*); 32 Op. Att'y Gen. 162 (1920); 39 Op. Att'y Gen. 556 (1937). When a child claimed citizenship on the basis of an unwed United States citizen mother, the State Department recognized the child as a citizen if the identity of the child's father had not been legally established by legitimation or adjudication, on the ground that the mother stood in the position of the father in such cases. *1940 Hearings* 431. The Attorney General, however, rejected that view in 1939, at least with respect to children born before the 1934 Act. 39 Op. Att'y Gen. 290 (1939); 39 Op. Att'y Gen. 397 (1939). In so doing, the Attorney General suggested that the unavailability of citizenship to children born out of wedlock abroad to a United States citizen mother would be a proper subject for congressional action. 39 Op. Att'y Gen. at 291.

Congress took up that issue as part of its general overhaul of the naturalization laws in 1940. In 1938, President Roosevelt had submitted to Congress a proposed new nationality code ("Proposed Code") that had been prepared by his Secretary of State, Attorney General, and Secretary of Labor. *1940 Hearings* 405-515. Congress considered the Proposed Code against the background of European and Asian wars that threatened the lives, liberty, and property of Americans abroad. At a time when democracy was under attack throughout the world, and the United States faced grave problems in defending its interests and citizens abroad, Congress undertook "a studied effort to * * * facilitate the naturalization of worthy candidates and,

at the same time, protect the United States against adding to its body of citizens persons who would be a potential liability rather than an asset." H.R. Rep. No. 2396, 76th Cong., 3d Sess. 2 (1940).

The drafters of the Proposed Code first addressed the status of children of married parents, and in particular married parents who were United States citizens. The drafters noted that in the "great majority" of foreign-birth cases, "husband and wife are both citizens of the United States." *1940 Hearings* 422. The drafters concluded that citizenship should be conferred generously on the children of those couples, because "[i]n such cases it is altogether likely that the children will be taught to speak the English language from infancy and will be so brought up that they will be truly American in character." *Ibid.* Accordingly, Section 201(c) of the Nationality Act of 1940, ch. 876, 54 Stat. 1138 (1940 Act), which became Section 301(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1401(c), conferred citizenship on any child born abroad to two United States citizens in wedlock, retaining only the longstanding requirement that at least one parent "has resided in the United States * * * prior to the birth of [the child]." 54 Stat. 1138.

By contrast, "[t]he problem of the child born abroad to parents of different nationalities was the subject of extended consideration." *1940 Hearings* 409. That was because, in the view of the drafters of the Proposed Code, conferring citizenship at birth on the foreign-born children of married couples with mixed citizenship presented "greater difficulties" and "require[d] correspondingly stricter limitations." *1940 Hearings* 423; see *id.* at 42 (claims for protection made by children born abroad, to parents with mixed citizenship, are "the most difficult" citizenship problem). The drafters proposed that citizenship be conferred in that context if the citizen parent had resided in the United States for at least

ten years before the child's birth, and suggested that the child be required to satisfy a residency requirement and take an oath of allegiance after turning 21. *Id.* at 426-427. The drafters of the Proposed Code explained that "[a] foreign-born child whose citizen parent has not resided in this country as much as 10 years aitogether is likely to be more alien than American in character." *Id.* at 426.[8] Congress eliminated the oath of allegiance, toughened the parental residency requirement, and altered the wording slightly, but otherwise adopted the drafters' proposal as Section 201(g) of the 1940 Act, 54 Stat. 1139. The residency requirements have been reduced over the years, but the same basic provision remains in force today as Section 301(a)(7) of the INA, 8 U.S.C. 1401(g).

Section 205 of the 1940 Act (App., *infra*, 6a) addressed the status of children born abroad out of wedlock, which had been thrown into some confusion by the Attorney General's opinions of 1939, discussed above. The first paragraph of Section 205 provided that, in the case of a child born out of wedlock to a United States citizen father, the provisions of Section 201 (governing the status of children born *in* wedlock) would apply "provided the paternity is established during minority, by legitimation, or adjudication of a competent court." 54 Stat. 1139. In the United States and most other nations in 1940, legitimation typically required marriage (or attempted marriage) of the father and the mother or, in some jurisdictions, a formal acknowledgment of paternity by the father. See *1940 Hearings* 431; Harry D. Krause, *Illegitimacy: Law and Social Policy* 11-14, 19-20 (1971) (surveying state laws). Adjudication or legitimation

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[8] The residency requirement applicable to the child was not to apply if the citizen parent was working abroad for the United States government or certain American institutions, on the premise that such parents were likely to "retain their American sympathies and character" and to "bring up their children as Americans." *1940 Hearings* 427.

by marriage or other authorized method after the child was born supplied, at that later date, the necessary element of a legally recognized relationship between father and child that was present at birth for children born in wedlock. As a result, the first paragraph of Section 205 enabled the father of a child born out of wedlock to acquire the same legal recognition of and protection for his "interest in assuming a responsible role in the future of his child" with respect to citizenship as the father of a child born in wedlock possesses upon the child's birth. *Lehr* v. *Robertson*, 463 U.S. at 263. Thus, consistent with the principle "that rights of the parents are a counterpart of the responsibilities they have assumed," *id.* at 257, Section 205 equalized the status of married and unmarried citizen fathers if the unmarried fathers entered into a legal relationship with their children born abroad that was comparable to the legal relationship between a married father and his children, and thereby assumed the legal obligations of married fathers to their children. The children of such unwed fathers would be eligible for citizenship if they met the requirements, set out in Section 201, for children of married citizen parents to have "a real American background." S. Rep. No. 2150, 76th Cong., 3d Sess. 4 (1940).

The second paragraph of Section 205 ensured that children born abroad out of wedlock could obtain United States citizenship based upon the United States citizenship of their mother, which would have been in doubt—particularly for children born before 1934—in the absence of a specific statutory provision giving unwed mothers the right to convey citizenship. *1940 Hearings* 43; see 39 Op. Att'y Gen. 290 (1939); 39 Op. Att'y Gen. 397 (1939). The situation of unwed citizen mothers was different than that of unwed citizen fathers, however, and different rules were deemed appropriate.

In the first place, there was no question of the mother's legal right to custody and control of the illegitimate child, as that was established under American law (and the law of most other nations) at the child's birth. *1940 Hearings* 431 (noting domestic laws of United States, Spain, and France, and citizenship laws of 30 nations); see Harry D. Krause, *supra*, at 5 ("[W]ith respect to its mother, the illegitimate has long been equal or substantially equal to his legitimate sibling."); see also, *e.g.*, *Quilloin* v. *Wallcott*, 434 U.S. 246, 248-249 (1978) (discussing Georgia law under which "the mother is the only recognized parent" of a child born out of wedlock absent legitimation by the father). It thus was not necessary to have a provision in the second paragraph of Section 205 analogous to the "legitimation, or adjudication" provision of the first paragraph.

Congress also found it appropriate, in the case of children of unwed mothers, to relax the residency requirements of Section 201. The United States has always applied the rule of "*jus soli*, that is, that the place of birth governs citizenship status except as modified by statute." *Bellei*, 401 U.S. at 828. Many other nations, however, apply the civil-law rule of *jus sanguinis*, under which citizenship is acquired principally based upon the blood relationship with a parent. See authorities cited in *Miller*, 523 U.S. at 477 (Breyer, J., dissenting). In connection with the Proposed Code, the Administration surveyed the citizenship laws of other nations and discovered that in approximately 30 nations, a child born out of wedlock was given the citizenship of the mother (subject, in most but not all cases, to taking the citizenship of the father in the event of legitimation). *1940 Hearings* 431; see Durward V. Sandifer, *A Comparative Study of Laws Relating to Nationality at Birth and to Loss of Nationality*, 29 Am. J. Int'l L. 248, 258-259 (1935). Against the background of the American rule of *jus soli*, the result of these *jus sanguinis* laws was to create a risk of statelessness

among the foreign-born children of unwed United States citizen mothers. Such children, having been born abroad, would not be citizens of the United States by birth under the Fourteenth Amendment. But, unless the mother had dual citizenship, the children generally would not, due to the United States citizenship of the mother, be citizens of any foreign country. See Frederick Van Dyne, *Citizenship of the United States* 49 (1904) ("The nationality of an illegitimate child born to an American mother abroad would, by the law of nations, follow that of the mother."). Thus, unless the law of the United States accommodated the *jus sanguinis* rules of other nations, those children would not be citizens of any nation.[9]

The statelessness issue had been discussed as early as 1933, when Congress considered (but did not adopt as part of the 1934 Act) a provision addressed specifically to the situation of children born abroad out of wedlock. See *Relating to Naturalization and Citizenship Status of Children Whose Mothers Are Citizens of the United States, and Relating to the Removal of Certain Inequalities in Matters of Nationality: Hearings Before the House Comm. on Immigration and Naturalization*, 73d Cong., 1st Sess. 8-9 (1933) (State Department proposed amendment); see also *id.* at 54-55 (discussing statelessness problem in the context of English/American marriages). The issue was raised again during the *1940 Hearings* (at 43). Recognizing that statelessness is "deplored in the international community of democracies" and can have "disastrous consequences" for the individual, *Trop* v. *Dulles*, 356 U.S. 86, 102 (1958) (opinion of Warren, C.J.), Congress took steps in 1940 to reduce the risk. Under

[9] There would be a parallel problem of statelessness in the case of children who lost their mother's foreign citizenship due to legitimation by their United States citizen father. That problem, however, had been addressed by the first paragraph of Section 205, which provided that such children would become eligible for United States citizenship as a result of the same legitimation that might endanger the child's foreign citizenship.

the second paragraph of Section 205, the foreign-born child of an unwed United States citizen mother—who might not be eligible for citizenship in any other nation—would be guaranteed United States citizenship if the mother "had previously resided in the United States" for any period of time, unless the child was legitimated by the father and thus became eligible to receive the father's citizenship. See App., *infra*, 6a.

3. In 1952, Congress reenacted the first paragraph of Section 205 without material change as Section 309(a) of the new INA, 8 U.S.C. 1409(a) (App., *infra*, 5a). The second paragraph of Section 205 became Section 309(c), 8 U.S.C. 1409(c) (App., *infra*, 5a-6a), with two changes. *First*, the child of an unwed citizen mother could be a citizen regardless of legitimation by the father. *Second*, Congress adopted a somewhat stricter requirement for ensuring a connection between the unwed mother and the United States by providing that, in order to transmit citizenship to her foreign-born child, an unwed United States citizen mother must "ha[ve] previously been physically present in the United States or one of its outlying possessions for a continuous period of one year." *Ibid.* Legislators determined, however, that it remained inappropriate to subject unwed United States citizen mothers who gave birth abroad to the same physical-presence requirements as other citizen parents. As the Senate Report explained, the relatively generous one-year period applicable to unwed citizen mothers under Section 1409(c) "insure[d] that the child shall have a nationality at birth." See S. Rep. No. 1137, 82d Cong., 2d Sess. 39 (1952). Both changes made in 1952 survive today in the current version of Section 1409(c).

4. In 1986, Congress revised Section 1409 to make it easier for unwed citizen fathers to secure citizenship for

their foreign-born children.[10] *Administration of the Immigration and Nationality Laws: Hearing Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 118, 155 (1986) (*1986 Hearing*). Although a father still could obtain formal recognition of his paternal relationship through the traditional means of legitimation or adjudication, the 1986 amendment to Section 1409(a) additionally allowed fathers to secure citizenship for their foreign-born child by "acknowledg[ing] * * * paternity of the [child] in writing under oath," even if that option was not recognized as a form of legitimation by the relevant jurisdiction. With this change, codified in current Section 1409(a)(4)(B), Congress eliminated the indirect limitation on citizenship that had resulted from the failure of some jurisdictions to recognize legitimation by paternal acknowledgment of the child. See Homer H. Clark, Jr., *The Law of Domestic Relations in the United States* 310 & nn.10, 11 (2d ed. 1987) (listing States that required marriage to legitimate the child). Fathers who could not legitimate their child due to the death or marriage of the mother gained the opportunity to have the child become a United States citizen through a process that approximated legitimation. The new acknowledgment option also "simplif[ied] and facilitate[d]" administration of Section 1409(a), "by eliminating the necessity of determining the father's residence or domicile and establishing satisfaction of the legitimation provisions of the jurisdiction." *1986 Hearing* 150.

At the same time, however, the inclusion of a method of formalizing a paternal relationship that might not be recognized by the child's place of residence or domicile created new problems. If a child was acknowledged under Section

[10] Congress also made non-substantive changes to Section 1409(a) in the Immigration Technical Corrections Act of 1988 (ITCA), Pub. L. No. 100-525, § 8(k), 102 Stat. 2617-2618.

1409(a), but not legitimated (or adjudicated to be a father) in the appropriate jurisdiction, then a putative father could secure citizenship for the child without assuming the obligation of support that married fathers have, and that unmarried fathers would have assumed as a result of the provisions in the 1940 and 1952 versions of Section 1409(a) that conditioned citizenship on legitimation or an adjudication of paternity. The new opportunity to obtain the benefits of legitimation without the attendant responsibilities also would create a risk of fraud, whereby men who were not natural fathers might claim paternity solely for the purpose of securing citizenship for the child. See *1986 Hearing* 150. To address those concerns, new Section 1409(a)(1) required "clear and convincing evidence" of a blood relationship between the child and the father, while new Section 1409(a)(3) required the father to agree in writing to support the child financially until the age of 18.

The 1986 amendments did not change Section 1409(c), which continues to provide that a child born abroad out of wedlock "shall be held to have acquired at birth the nationality status of his mother, * * * if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year." 8 U.S.C. 1409(c).

B. Section 1409(a) Must Be Upheld If It Reflects A "Facially Legitimate And Bona Fide" Policy Choice By Congress

Petitioners seek to have Nguyen declared a naturalized citizen through one more modification of Section 1409(a)—this one accomplished by the Court. See Pet. Br. 32-39. The fact that petitioners claim Nguyen is entitled to citizenship under a (judicially revised) statutory grant—and concede he has no entitlement to citizenship under the Fourteenth Amendment—is critical, for it dictates a highly deferential standard of equal protection review.

1. The Constitution "contemplates two sources of citizenship, and two only: birth and naturalization." *Wong Kim Ark*, 169 U.S. at 702. Under Section 1 of the Fourteenth Amendment, "[e]very person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, and needs no naturalization." *Ibid.*[11] Although not expressly guaranteed by the Constitution until after the Civil War, citizenship by place of birth was the fundamental rule of citizenship established by Anglo-American common law (see *id.* at 674-675, 688), and the rule in this country has always been "that the place of birth governs citizenship status except as modified by statute." *Bellei*, 401 U.S. at 828.[12]

Before the Fourteenth Amendment formally recognized citizenship by birth within the United States, the Constitution had specifically addressed only Congress's power to grant naturalized citizenship. Article I, Section 8, Clause 4, provides that "[t]he Congress shall have Power * * * To establish an uniform Rule of Naturalization." As discussed above, Congress first exercised that power in the Act of March 26, 1790. In successive naturalization laws, Congress revised the statutory rules for conferring United States citizenship upon foreign-born children of United States citizens, and also established naturalization rules for non-

[11] The exception for persons born within the United States but not "subject to the jurisdiction thereof" has been held to cover children born in this country to foreign diplomats, children born on foreign ships, children born to hostile occupying forces, and tribal Indians, who were considered to be subject in the first instance to the sovereign jurisdiction of their respective Tribes. *Wong Kim Ark*, 169 U.S. at 693; see also 8 U.S.C. 1401(b) (extending citizenship at birth to members of Indian Tribes).

[12] Enshrining citizenship by birth in the Fourteenth Amendment served to overrule the *Dred Scott* case (*Scott* v. *Sandford*, 60 U.S. (19 How.) 393 (1857)), which rejected the claim that a native-born black man who had been a free man, but was later returned to slavery in a different State, was a citizen of the United States.

citizen aliens resident in the United States, and their children. See generally *Wong Kim Ark*, 169 U.S. at 672-674 (discussing statutes relating to foreign-born children); *Bellei*, 401 U.S. at 823-824 (same).

During two centuries of congressional lawmaking, this Court has consistently held that Congress's determinations about who should receive the benefits and protections of citizenship are subject only to a particularly deferential form of rationality review. In *Wong Kim Ark*, the Court stressed that "nationality by descent is based wholly upon statutory enactments." 169 U.S. at 670 (internal quotation omitted). The Fourteenth Amendment "left that subject to be regulated, as it has always been, by Congress, in the exercise of the power conferred by the Constitution to establish an uniform rule of naturalization." *Id.* at 688. And later cases confirm that "[n]o alien has the slightest right to naturalization unless all statutory requirements are complied with." *United States* v. *Ginsberg*, 243 U.S. 472, 475 (1917). Accordingly, the question whether the foreign-born child of a United States citizen should be made a citizen is a policy matter committed to Congress. *Bellei*, 401 U.S. at 830.

Courts are particularly ill-suited to second-guess Congress's judgments about what classes of persons should be eligible for statutory citizenship, for several reasons. *First*, admission to citizenship involves the question of who is entitled to share in the benefits, protections, and responsibilities of our constitutional democracy, including the protection of our Nation while abroad. See *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 265-266 (1990). The judiciary has an unquestioned role in protecting rights accorded under the Constitution to citizens and to those aliens who have been allowed to become legal residents of this country, but it has no role in adopting the policies for determining which foreign-born persons should be permitted to become members of our society in the first place. See *Fong Yue*

Ting v. *United States*, 149 U.S. 698, 707 (1893) ("Every society possesses the undoubted right to determine who shall compose its members" (internal quotation marks omitted)); 2 Max Farrand, *The Records of the Federal Convention of 1787*, at 237 (1966) (remarks of Gouverneur Morris) ("every Society from a great nation down to a club ha[s] the right of declaring the conditions on which new members should be admitted"). In our society, the right to include or exclude is exercised by the Executive and Legislative Branches, not by the Judiciary. See *Fong Yue Ting*, 149 U.S. at 705; *Plyler* v. *Doe*, 457 U.S. 202, 219 n.19, 225 (1982).

Second, the power to deny citizenship is also the power to keep an alien outside the Nation's borders, and that authority "is an incident of every independent nation." *The Chinese Exclusion Case* (*Chae Chan Ping* v. *United States*), 130 U.S. 581, 603 (1889); see *Fong Yue Ting*, 149 U.S. at 705-713. Accordingly, "[c]ourts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Shaughnessy* v. *Mezei*, 345 U.S. 206, 210 (1953); see *Plyler*, 457 U.S. at 225 ("Congress has developed a complex scheme governing admission to our Nation and status within our borders. * * * The obvious need for delicate policy judgments has counseled the Judicial Branch to avoid intrusion into this field.").

Third, "any policy toward aliens is vitally and intricately interwoven with * * * the conduct of foreign relations." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952); see *Plyler*, 457 U.S. at 219 n.19 ("alienage classifications may be intimately related to the conduct of foreign policy"). The power to exclude and expel aliens (which, again, necessarily subsumes the power to deny them citizenship) is "a weapon of defense and reprisal confirmed by international law as a

power inherent in every sovereign state." *Harisiades*, 342 U.S. at 587-588. Use of that "weapon" is committed to the political Branches, which are responsible for "the entire control of international relations." *Fong Yue Ting*, 149 U.S. at 705 (quoting *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 659 (1892)); see *Diaz*, 426 U.S. at 81 ("Any rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution.").

For these reasons, the principle of deference to Congress's "broad power over immigration and naturalization" "has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government." *Fiallo*, 430 U.S. at 792, 793 n.4 (quoting *Galvan* v. *Press*, 347 U.S. 522, 531 (1954)); see *Kleindienst* v. *Mandel*, 408 U.S. 753, 766 (1972); *Harisiades*, 342 U.S. at 588-589. When Congress makes a policy choice in those areas, its choice will be upheld if the reviewing court can discern "a facially legitimate and bona fide reason" for Congress's decision. *Fiallo*, 430 U.S. at 794. Indeed, "[t]his Court has repeatedly emphasized that 'over no conceivable subject is the legislative power of Congress more complete.'" *Id.* at 792 (quoting *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U.S. 320, 339 (1909)).

Such deference affords Congress the practical latitude it needs to fulfill its responsibilities for national security, foreign affairs, and nation-building. The immigration and naturalization laws routinely include distinctions based upon nationality, parentage, marital status and other family relationships, occupation, age, and education (see *Diaz*, 426 U.S. at 79-80 n.13; see also 8 U.S.C. 1153 (immigration preferences)), yet judicial review is highly deferential. As a practical matter, "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes

rules that would be unacceptable if applied to citizens." *Diaz*, 426 U.S. at 79-80.

2. Petitioners suggest that the above-cited decisions, and the constitutional framework that supports them, are inapposite because petitioner Boulais is asserting his own rights as a citizen. Br. 24. But neither the Constitution's textual assignment of the naturalization power to Congress, nor the institutional limitations of the judiciary, depend upon the identity of the litigant. Indeed, *Fiallo* v. *Bell* squarely forecloses petitioners' argument. In *Fiallo*, the Court rejected a constitutional challenge to an immigration preference that served to reunite unwed mothers and their children in this country, where there was no similar preference based upon the relationship between unwed fathers and their children. 430 U.S. at 788-791. The parties bringing the due process and equal protection challenges included United States citizens, and they sought to distinguish prior immigration cases on that basis. *Id.* at 790 n.2, 794. The Court found that purported distinction untenable, explaining that its cases "rejected the suggestion that more searching judicial scrutiny [of immigration statutes] is required" when the constitutional rights of citizens are implicated. *Id.* at 794. "[L]imited judicial review" is appropriate "despite the impact of [entry] classifications on the interests of those already within our borders." *Id.* at 796 n.6. The Court explained that the "facially legitimate and bona fide reason" standard of review applicable in the immigration and naturalization area had been articulated in *Kleindienst* v. *Mandel*, which involved a First Amendment challenge by citizens. 430 U.S. at 794-795. The Court found no reason why a Fifth Amendment challenge (such as the one in *Fiallo*, as well as the one in this case) would warrant any stricter standard of review than the highly deferential standard applied to resolve the First Amendment challenge in *Kleindienst*. *Id.* at 795.

Petitioners further rely (Br. 25-26) upon the fact that Section 1409(a) grants eligible, foreign-born children of unwed citizen fathers United States citizenship "as of the date of birth." They argue that because Congress chose to convey citizenship as of the child's date of birth, a party seeking citizenship under Section 1409(a) is seeking a declaration of *pre-existing* citizenship, rather than a change of status from alien to citizen. Thus, petitioners maintain, Section 1409(a) should not be reviewed under the deferential standard that is employed when an alien challenges a naturalization statute. The three dissenting Justices in *Miller* made the same argument, see 523 U.S. at 478-481, but, we submit, it is incorrect.[13]

Section 1409 is a naturalization statute for purposes of constitutional law. As the Court explained in *Wong Kim Ark*, *supra*, "citizenship by birth is established by the * * * fact of birth under the circumstances defined in the Constitution. Every person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, and needs no naturalization." 169 U.S. at 702; see U.S. Const. Amend XIV, § 1. Petitioner Nguyen was born in Vietnam, not the United States, and thus is not eligible for citizenship by birth under the Fourteenth Amendment. He "can only become a citizen by being natu-

[13] A law review article on which petitioners rely (Br. 14, 15) concedes that "it is difficult to construct a persuasive case" for the distinction petitioners seek to draw. Cornelia T. L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in* Miller *v.* Albright, 1998 S. Ct. Rev. 1, 48. Professors Pillard and Aleinikoff note that citizenship statutes involve "membership decisions * * * that arguably call for the greatest degree of institutional deference." *Id.* at 51. Professors Pillard and Aleinikoff thus argue, not that Section 1409(a) could logically be subjected to a higher standard of scrutiny than other immigration and naturalization laws, but that the Court should cease deferring to the political Branches in the immigration and naturalization contexts generally. *Id.* at 49-63. We do not understand petitioners or their amici to be making that radical argument.

ralized." 169 U.S. at 702; see *Bellei*, 401 U.S. at 830 ("acquisition of citizenship by being born abroad of an American parent" is not constitutionally guaranteed citizenship, and "was necessarily left to proper congressional action"); *Miller*, 523 U.S. at 434 n.11 (opinion of Stevens, J.) ("Though petitioner claims to be a citizen from birth, * * * citizenship does not pass by descent. Thus she must still meet the statutory requirements set by Congress for citizenship.").

Like Section 1409(a), the earliest citizenship statutes, including the statutes of 1790, 1795, 1802, and 1855, provided that qualifying children born abroad would be treated as citizens from the day of their birth—yet these laws clearly were naturalization statutes. See *Bellei*, 401 U.S. at 823 & n.3 (discussing statutes); *Wong Kim Ark*, 169 U.S. at 672-674 (same). Section 1409 lies squarely within Congress's textually committed authority over naturalization, where the reviewing power of the courts is most limited. See generally *Bellei*, 401 U.S. at 827-836 (reviewing for reasonableness the residency requirements in a denaturalization statute).[14]

Petitioners also err in attaching significance (Br. 25) to the fact that Congress defined the term "naturalization"—"[a]s used in" the INA—to mean "the conferring of nationality * * * after birth." 8 U.S.C. 1101(a) and (a)(23). The drafters of the 1940 Act expressly noted that their definition of "naturalization"—which survives today in the INA—was "narrower" than the "broad[]" constitutional meaning of "naturalization" that had been suggested by the decisions of

[14] Petitioners' counterintuitive assertion (Br. 27-28) that the Court's application of rational basis review to the denaturalization statute in *Bellei* actually supports application of heightened scrutiny to Section 1409(a) is unfounded. The Court's review of denaturalization laws, even under the rational-basis standard, has always been tempered by a recognition of Congress's foreign affairs powers. *Perez* v. *Brownell*, 356 U.S. 44, 57-62 (1958). The Court in *Bellei* had no occasion to decide whether rationality review might be too onerous, because the law satisfied rationality review.

this Court. *1940 Hearings* 413-414. In the 1940 Act, the drafters used the term "naturalization" as a way of describing those grants of citizenship that are accomplished through the processes of administrative naturalization, as opposed to statutory grants of citizenship. *Ibid.*; see 8 U.S.C. 1421-1458 (1994 & Supp. IV 1998) (current naturalization provisions of INA). That drafting decision does not alter the fact that for *constitutional* purposes, there are only two categories of citizens: those who meet the Fourteenth Amendment's criteria for citizenship at birth, and those who are made citizens pursuant to Act of Congress (or, in the case of territorial annexation, by treaty). *Wong Kim Ark*, 169 U.S. at 702-703; *Minor* v. *Happersett*, 88 U.S. (21 Wall.) 162, 167 (1874) (Mem.) (same).

In any event, petitioners are incorrect (Br. 25) that an award of citizenship would merely "recognize[]" Nguyen's "existing status" as a United States citizen. Under the law that Congress enacted, it could not be clearer that Nguyen has no "existing status" as a citizen. Section 1409(a), moreover, establishes prerequisites for citizenship that can *only* be satisfied after the birth of the child. See 8 U.S.C. 1409(a)(1) (establishment of blood relationship by clear and convincing evidence); 8 U.S.C. 1409(a)(4) (legitimation, adjudication, or acknowledgment of paternity); see also 8 U.S.C. 1409(a)(3) (written agreement to support child). Nguyen is concededly unable to meet all the prerequisites for naturalized citizenship under Section 1409(a). Pet. Br. 5. Thus, he has always been, and remains today, an alien.

Nguyen's Vietnamese citizenship highlights the fallacy of petitioners' final argument (Br. 29), that statutes such as Section 1409(a) "ha[ve] little relevance to Congress's foreign relations power." If Nguyen were entitled to United States citizenship at birth as petitioners claim, he would (subject to Vietnamese law) be a citizen of both the United States and Vietnam. Dual citizenship "creates problems for the govern-

ments involved," stemming from the citizen's dual allegiance to two sovereigns. *Bellei*, 401 U.S. at 832. "[T]hese difficulties might well become acute, to the point of jeopardizing the successful conduct of international relations," as can occur when the dual citizen participates in the political or governmental affairs of his or her other country or is compelled by foreign law to act against the interests of the United States as a soldier or otherwise. *Perez* v. *Brownell*, 356 U.S. 44, 59 (1958); *Kawakita* v. *United States*, 343 U.S. 717, 734-736 (1952). The dangers associated with dual citizenship in fact figured prominently in Congress's drafting of the citizenship provisions of the 1940 Act. *Bellei*, 401 U.S. at 823-836; see S. Rep. No. 2150, *supra*, at 4 (discussing the "considerable trouble" caused by requests for protection from dual citizens living abroad).

"The importance and extreme delicacy" of dual citizenship "demand that Congress be permitted ample scope" to limit its occurrence. *Perez*, 356 U.S. at 60; see also *id.* at 62 (to overturn congressional judgments regarding denaturalization of dual citizens "would be to disregard the constitutional allocation of governmental functions that it is this Court's solemn duty to guard"). In addition, as when this Court considers whether United States law applies to events occurring in foreign countries, the fact that Section 1409 affects the status of persons born abroad and subject to foreign laws makes restraint particularly appropriate, in order to respect Congress's efforts to avoid "unintended clashes between our laws and those of other nations which could result in international discord." *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991). For these additional reasons, Congress's restrictions on conveyance of United States citizenship to foreign-born persons warrant deference.

C. Section 1409 Effectively Serves Congress's Valid Objectives

1. The issues presented for decision in this case are far narrower than petitioners suggest. In attempting to expand the scope of their as-applied challenge, petitioners ignore both the controlling effect of *Miller* and the limitations placed upon their challenge by the record below and the facts of this case.

a. Petitioner Nguyen relies upon the asserted right of petitioner Boulais, as a citizen of the United States, "to be free of discrimination in transmitting statutory 'citizenship at birth.'" Br. 24. Six Justices in *Miller* rejected an analogous third-party challenge to Section 1409(a) by the child of an unwed United States citizen father. Like the petitioner in *Miller*, Nguyen may not assert the rights of his father because there is no "hindrance to the [father]'s ability to protect his or her own interests." 523 U.S. at 447 (O'Connor, J., concurring in the judgment) (quoting *Powers* v. *Ohio*, 499 U.S. 400, 411 (1991)). The father, Boulais, is a petitioner here, and he is actively asserting his own alleged rights. Nguyen's own claim is essentially the same as the claim rejected in the opinions of Justices Stevens, O'Connor, and Scalia (collectively representing the views of six Justices) in *Miller*, and it should be rejected on that basis. The only remaining claim is that of petitioner Boulais, who asserts that Section 1409(a) discriminates against him as a male citizen.

b. Petitioners do not challenge some of Section 1409(a)'s conditions on the conferral of United States citizenship. They do not challenge the requirement, set forth in Section 1409(a)(1), that a child seeking citizenship through his or her unwed father establish paternity by clear and convincing evidence. See Pet. Br. 21. As noted above (pp. 20-21, *supra*), that requirement is appropriate "[t]o deter fraudulent claims" of entitlement to derivative citizenship. *1986 Hear-*

ing 150; see also 523 U.S. at 485 (Breyer, J., dissenting) ("I believe that biological differences between men and women would justify [applying Section 1409(a)(1)] where paternity is at issue."). Petitioners also do not challenge the physical-presence requirements applicable to unwed citizen fathers under Section 1401, which are incorporated by reference in the first sentence of Section 1409(a). As this Court recognized in *Bellei* (401 U.S. at 834), those requirements reflect "the importance of residence in this country as the talisman of dedicated attachment" to the Nation. See Pet. Br. 20, 35 n.13.

Petitioners do challenge the requirement, set forth in Section 1409(a)(3), that an unwed citizen father, if living, must agree to support his child who seeks citizenship until the child reaches the age of 18. Yet that paternal support requirement is not properly at issue, either. In the first place, Nguyen was free to elect to come under the pre-1986 version of Section 1409(a), which did not contain a support requirement.[15] Moreover, petitioners challenge Section 1409(a) as part of their effort to overturn the deportation order against Nguyen. Pet. Br. 7; Pet. App. 4a-6a; see 8 U.S.C. 1105a(a)(5). The statutory requirement that the father commit to support his child until age 18 was not at issue in the deportation proceeding, because Nguyen did not claim an entitlement to United States citizenship until he was 28 years of age. Pet. App. 2a, 3a, 13a. The court of appeals held only that Nguyen failed to establish citizenship

[15] Nguyen falls within a transition rule that allowed him to select application of Section 1409(a) either as amended in 1986 or as it stood before the amendment (when the law required that paternity be "established while such child is under the age of twenty-one years by legitimation," 8 U.S.C. 1409(a) (1982)). See Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, 100 Stat. 3655, as added by ITCA § 8(r), 102 Stat. 2618-2619. Nguyen did not make an election (Pet. Br. 6 n.1), and he failed to satisfy either the old or the new rules. We discuss the new provision, which is of more general interest.

under Section 1409(a) because of Boulais's failure to legitimate Nguyen or otherwise establish paternity before age 18. *Id.* at 8a. The constitutionality of Section 1409(a)(3)'s support requirement therefore has no bearing on the lawfulness of the deportation order in this case, or on the correctness of the court of appeals' judgment. Accordingly, there is no reason to consider that question. Cf. *Miller*, 523 U.S. at 432 (opinion of Stevens, J.).[16]

2. Only 8 U.S.C. 1409(a)(4)—the requirement that, before the child reaches age 18, the citizen father legitimate the child, acknowledge the child under oath, or be adjudicated the father—is genuinely at issue in this case. As explained above, that requirement serves to ensure that an unwed citizen father whose child is to be made a citizen under Section 1409(a) has attained the same legal relation to the child, at some point while the child is still a minor, as both a married citizen father and a married citizen mother have *at*

[16] In any event, Section 1409(a)(3) is a reasonable means of "lessen[ing] the chance that" a child who secures citizenship through the acknowledgment option added in 1986 will "become a financial burden to the states" after gaining citizenship. *1986 Hearings* 150. Where the father has legitimated the child, or been adjudicated as the father, a support obligation already exists (as it does from birth in the case of the mother), and Section 1409(a)(3) imposes no additional obligation on the father. See generally *Gomez* v. *Perez*, 409 U.S. 535, 536-537 (1973) (per curiam) (discussing absence of obligation to support illegitimate children under Texas law); *Rivera* v. *Minnich*, 483 U.S. 574, 580 (1987) (noting financial obligation "that flow[s] from a court order that establishes paternity"). Section 1409(a)(3) therefore serves to put fathers who take advantage of the less-burdensome formal-acknowledgment option on a more equal footing, insofar as their legal relationship with their children is concerned, with mothers and other fathers whose children may become citizens under Section 1409. Section 1409(a)(3) does not guarantee actual support (see National Women's Law Center Amicus Br. 28), just as the legal obligation of the mother of an illegitimate child, or of a father who legitimates a child or is adjudicated the father in a paternity suit, does not itself guarantee that financial support will be forthcoming (see *id.* at 26-27). A commitment to support the child is, however, a reasonable way of increasing the likelihood that support will be provided.

birth to a child who is made a citizen under Section 1401, or as an unwed citizen mother has at birth to a child who is made a citizen under Section 1409(c). While an unwed mother need not provide proof of a recognized and formal relationship with her child, that relationship is almost invariably established by the fact of maternity. See p. 17, *supra*; see also *Lehr* v. *Robertson*, 463 U.S. at 260 n.16 ("The mother carries and bears the child, and in this sense her parental relationship is clear. The validity of the father's parental claims must be gauged by other measures.") (quoting *Caban* v. *Mohammed*, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting). Moreover, Congress minimized the burdens on unwed mothers who seek citizenship for their children under Section 1409(c) in order to advance its important interest in avoiding statelessness.

Neither of those two bases for treating unwed citizen fathers differently than unwed citizen mothers relies upon outdated "stereotypes about the roles and capacities of mothers and fathers of out-of-wedlock children." National Women's Law Center Amicus Br. 12. To the contrary, Congress sought expressly to eliminate gender-based distinctions from what are now Sections 1401 and 1409, whenever Congress concluded it was practicable to do so. That effort began with the 1934 revision that, as Justice Ginsburg stated in *Miller*, "[t]erminated the discrimination against United States citizen mothers" by conferring United States citizenship on children who are born abroad to a married United States citizen mother. *Miller*, 523 U.S. at 465-466; see p. 12, *supra*.

The effort continued in 1940. The Roosevelt Administration recognized that the 1934 Act had "place[d] American fathers and mothers on an equal plane with regard to transmission of citizenship" and intended that its Proposed Code would "carry out the principle of equality between men and women in the matter of nationality." *1940 Hearings* 421, 422. The 1940 Act accordingly established a gender-neutral approach to conferring citizenship on legitimate children (see 54 Stat. 1138-1139), which survives today in 8 U.S.C. 1401. Congress also for the first time provided by statute for children born out of wedlock to obtain United States citizenship on the basis of the citizenship of their mother as well as their father. But the drafters of the 1940 Act recognized that, in the special context of children born out of wedlock, provisions designed to promote parity between men and women should be accompanied by provisions that address the problem of statelessness and by requirements that protect Congress's "patently reasonable" interest in ensuring that children who obtain citizenship have a substantial connection to the United States. See *1940 Hearings* 421-423.

In 1952, the drafters of the INA again sought to "[e]liminate[] discrimination between the sexes" (H.R. Rep. No. 1365, 82d Cong., 2d Sess. 28 (1952)) and accordingly deleted the provision of what is now Section 1409(c) that had made conferral of citizenship on an illegitimate child born abroad to a United States citizen mother contingent upon the absence of paternal legitimation or an adjudication of paternity. Compare App., *infra*, 6a (1940 Act) with *id.* at 5a-6a (INA). And again in 1986, Congress took steps to address a perceived comparative disadvantage to unwed fathers, by loosening the requirements for establishing a legally cognizable paternal relationship. See *1986 Hearing* 118, 150.

Just as it cannot reasonably be argued that each of those Congresses lacked sensitivity to gender discrimination, it cannot be said that Congress's reasons for treating unwed mothers differently from unwed fathers have recently become obsolete. Those reasons arise in part from the treatment of unwed parents and their children under the laws of other nations. And it remains the case that children born out of wedlock generally are recognized to have the citizenship of their mother unless and until legitimated or formally ac-

knowledged by the father.[17] We have been informed by the Department of State that, in connection with this case, it has consulted with consular officers in six nations in which the United States has or has had a significant military presence and which account for a large proportion of citizenship claims by children born abroad out of wedlock. The Department reports that all six nations (Germany, Great Britain, the Philippines, South Korea, Thailand, and Vietnam) require that the father's name must appear on the child's birth certificate, or that the father must take some other formal act to acknowledge paternity, in order for the father's citizenship to pass to the child by descent.[18] The danger of statelessness in the event that the father does not acknowledge the child remains a concern under the laws of at least three of those six nations (Germany, South Korea, and Vietnam), and is a practical concern in a fourth (Thailand) due to non-compliance with the legal obligation of unwed Thai fathers to legitimate and support their children.

Americans living abroad also have recognized the continuing problem of statelessness. During hearings on the 1986 Act, several groups representing expatriate Americans submitted testimony expressing concern—not that Section 1409(a) was insufficiently generous to United States citizen *fathers*, as petitioners assert—but that some unwed citizen

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[17] Analogously, in this country, the States and courts continue to apply the traditional rule that an illegitimate child takes the mother's domicile, at least absent legitimation by the father or adjudicated paternity. See *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 48-49 (1989).

[18] See § 1 para. 4 Staatsangehoerigkeitsgesetz (German citizenship statute); British Nationality Act, 1981, §§ 47, 50(9); Philippine Const. Art. IV, §§ 1-4 (1987) (citizenship) and Philippine Family Code tit. VI (effective Aug. 3, 1998) (establishment of paternity and filiation); New Nationality Law, July 1998, art. 4531 (effective June 14, 1998) (South Korea); Thai Nationality Act of 1992 (as amended), §§ 7(1), 10; Nationality Law of Vietnam, May 20, 1998, art. 17 and 83/1998/ND-CP Decree of the Government on Civil Registration arts. 19, 47 (Oct. 10, 1998).

mothers might not have been physically present in the United States for one year as required by Section 1409(c), making their children stateless at birth unless the birth country granted *jus soli* citizenship. *1986 Hearing* 328.

This Court's decisions further confirm the continued permissibility of a requirement in the INA that the father of a child born out of wedlock must, while the child is still a minor, take some affirmative step—not required of an unwed mother—to establish a formally recognized legal relationship with his child in order to have conferred on that child the formally recognized legal status of being a United States citizen. In *Lehr* v. *Robertson*, *supra*, the putative natural father of a child born out of wedlock challenged the State's failure to give him prior notice of an adoption proceeding, which was not provided because the father failed to take the simple step of registering in a "putative father registry." The Court rejected the father's claim that equal protection guaranteed him prior notice of adoption proceedings, in order to safeguard his "inchoate relationship" with the child. *Id.* at 249-250. The Court quoted with approval Justice Stewart's observation in his dissenting opinion in *Caban*, 441 U.S. at 397, that "[p]arental rights do not spring full-blown from the biological connection between parent and child," but "require relationships more enduring." 463 U.S. at 260. The Court accordingly held that "the existence or nonexistence of a substantial relationship between parent and child is a relevant criterion." *Id.* at 266. In a case in which "one parent has an established custodial relationship with the child and the other parent has either abandoned or never established a relationship, the Equal Protection Clause does not prevent a State from according the two parents different legal rights." *Id.* at 266-267 (footnote omitted).[19]

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[19] Contrary to Justice Breyer's dissent in *Miller* (523 U.S. at 487-488), the issue is not simply whether the unwed father will in fact be a "Caretaker Parent" following legitimation, an adjudication of paternity, or

Lehr confirms that Congress is not constitutionally required to ignore real differences in the situations of unwed citizen mothers and fathers when it frames rules for the conferral of citizenship at birth. See also *Parham* v. *Hughes*, 441 U.S. 347, 354-357 (1979) (opinion of Stewart, J.) (state law making father's right to sue for the wrongful death of an illegitimate child contingent upon prior legitimation of the child, but granting mothers the right to sue, "is realistically based upon the differences in [the mother's and father's] situations"). Also as in *Lehr*, the scheme Congress enacted here is not "likely to omit many responsible fathers" (463 U.S. at 264), because Section 1409(a) provides the citizen father a full 18 years to take simple steps to substantiate his paternal relationship and, in so doing, to render his child eligible for United States citizenship. Cf. *Clark* v. *Jeter*, 486 U.S. 456, 462, 465 (1988) (finding a 6-year statute of limitations too short "to present a reasonable opportunity" to assert child-support claims on behalf of illegitimate children, but suggesting that 18 years would satisfy equal protection requirements under heightened scrutiny); 42 U.S.C. 666(a)(5) (Supp. IV 1998), discussed at p. 45, *infra*.

Congress has made a reasonable judgment that where a citizen father has not formalized his relationship with his child at any time during the child's minority, the child is not so likely to develop family ties to the United States that an automatic grant of citizenship is warranted on the basis of biological paternity alone. Cf. *Lehr*, 463 U.S. at 259-268. And, as we have said, the enduring relationship between the United States and its citizens is itself a formal and legally recognized one and carries with it reciprocal rights and

formal acknowledgment of the child. Any parent, whether an unwed father, an unwed mother, or a married parent, *might* cease to care for his or her child after that child becomes a citizen under Section 1401 or 1409. Section 1409(a)(4) instead serves to ensure that, in the case of an unwed father, there is an approximation of the formal and legal relationship that exists between a married parent or an unwed mother and the child.

responsibilities, which provides an independent reason to insist, as a condition of conferring citizenship on the child, that the relationship between a citizen parent and a child born out of wedlock have comparable attributes during the child's minority. Particularly in the context of determining eligibility for citizenship, then, the "legislative policy distinction[]" (*Fiallo*, 430 U.S. at 798) petitioners challenge is entirely permissible. In short, "the different treatment of men and women [in Section 1409(a)(4)] reflects, not archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female [unwed citizen parents] are *not* similarly situated with respect to" their child's claim to United States citizenship. *Schlesinger* v. *Ballard*, 419 U.S. 498, 508 (1975) (emphasis added) (upholding gender-based distinctions in eligibility for military promotions).

It must be stressed that Section 1409(a)(4) places a minimal burden on the father. As noted above, a father who has not already established a formal legal relationship with the child under the law of the child's residence or domicile may take the simple step, independent of the local laws, of making the sworn acknowledgment Congress provided for in 1986 (Section 1409(a)(4)(B)). That minimal burden is all the more justifiable in light of other avenues to citizenship that Congress has made available. Under current law, a foreign-born child may gain citizenship by virtue of a parent's naturalization as a United States citizen. See 8 U.S.C. 1431-1432.[20] And a foreign-born child who does not secure citizen-

[20] In addition, in new Section 320 of the INA, Congress recently provided citizenship to foreign-born minor children of citizen parents, if the child is a permanent resident of the United States and is "in the legal and physical custody of the citizen parent." Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631 (2000); see also *ibid.* (INA § 322) (eligibility for minor children who reside outside the United States in the custody of a United States citizen parent, but are temporarily present in the United States). Section 320 allows citizen mothers and citizen fathers (including

ship by virtue of ties established by his or her parents during the child's minority, but nevertheless develops substantial connections to the United States through marriage or permanent residence in the United States, may become a naturalized citizen on his or her own account by satisfying Congress's requirements. See 8 U.S.C. 1423-1424, 1430; 8 U.S.C. 1427 (1994 & Supp. IV 1998). Those offers of citizenship to foreign-born children who are likely to be "an asset" to the United States (H.R. Rep. No. 2396, 76th Cong., 3d Sess. 2 (1940)) by virtue of their connections to the Nation, further confirm the reasonableness of Congress's comprehensive naturalization scheme.

The factual contrast between this case and *Miller* bears out the fallacy of petitioners' argument (Br. 22) that Section 1409(a)(4) is just another way of "ensuring a blood tie" between American father and foreign-born child. In this case, Boulais raised Nguyen in the United States from 1975 until Nguyen became an adult. *Id.* at 5. Having decided to establish a paternal relationship with his minor son, Boulais readily could have secured United States citizenship for Nguyen under Section 1409(a) at any time until Nguyen became an adult in 1987. Thereafter, Nguyen, as a permanent resident alien since 1975 (*ibid.*), was free to pursue citizenship on his own account under 8 U.S.C. 1427 (1994 & Supp. IV 1998). The record does not explain petitioners' failure to seek citizenship for Nguyen until it was too late, but Congress cannot be faulted if petitioners did not take advantage of the benefit it extended. Compare *Lehr*, 463 U.S. at 264 ("The possibility that [the putative father] may have failed [to place his name in the putative father registry] because of his ignorance of the law cannot be a sufficient reason for criticizing the law itself.").

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fathers who have legitimated their children) to obtain, on a gender-neutral basis, citizenship for children who settle with them in the United States.

In sharp contrast to Nguyen's situation, the petitioner in *Miller* was born and raised by her Filipino mother in the Philippines, while her American father lived in the United States and apparently never visited his daughter. There was no evidence of any formal or recognized legal relationship between Miller and her American father (or indeed any relationship at all) until the father filed a petition to establish paternity 22 years after his daughter's birth. Miller did not live in the United States prior to age 21. 523 U.S. at 424-425.[21] Congress could—and did—permissibly determine that children such as Nguyen should be eligible for citizenship if the father takes appropriate steps while the child is still a minor to establish a formal or legal relationship with the child, whereas children such as Miller, whose relationship with their American father throughout their childhood is only biological, are not likely to have developed significant ties to this country and should not have the same entitlement to citizenship. Petitioner would have the Court strike down the very provisions that draw that distinction, and rewrite Section 1409 so as to expand greatly Congress's grant of citizenship. Pet. Br. 20, 33.[22]

Petitioners also err in suggesting (Br. 20) that the lack of a maternal acknowledgment requirement in Section 1409(c) establishes that Congress has no genuine interest in enforcing Section 1409(a)(4). As already discussed, unwed

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[21] As in *Miller*, the child seeking United States citizenship in the pending case of *United States* v. *Ahumada-Aguilar*, No. 99-1872, had no relationship with his American father. See 189 F.3d at 1122-1123. The child seeking citizenship in *Lake* v. *Reno*, No. 00-963, had only "intermittent contact" with his citizen father. 226 F.3d at 143.

[22] As discussed in Part II, *infra*, retroactive application of the remedy petitioners seek would open the door to claims of United States citizenship by untold numbers of persons. If the remedy were extended in subsequent litigation to claims governed by the 1940 and 1952 Acts, rather than just the 1986 amendments to Section 1409(a), the number of new citizens admitted without congressional authorization would be even greater.

mothers, unlike unwed fathers, are almost universally recognized as having a legal relationship with the child by virtue of the birth alone and to have custody of the child at birth. See p. 17, *supra*. And Congress's efforts to combat statelessness support the more permissive rule of Section 1409(c). The foreign-born child of an unwed American mother is at much greater risk of losing his or her "status in organized society" (*Trop*, 356 U.S. at 101 (opinion of Warren, C.J.)) than the foreign-born child of an unwed American father. Congress's decision to address that compelling problem by making citizenship more readily available through Section 1409(c) does not nullify Congress's general concern —reflected in the provisions of Section 1401 as well as 1409 —that foreign-born children should be granted citizenship only if they have some ongoing tie to their American parent.

It might be argued that Congress could have tailored Section 1409(c) by excepting unwed citizen mothers from the requirements of Section 1409(a) if, and only if, applying such requirements would render their child stateless. Such an attack on Congress's policy decision would ignore this Court's judgment that "legislative distinctions in the immigration area need not be as 'carefully tuned to alternative considerations' * * * as those in the domestic area." *Fiallo*, 430 U.S. at 799 n.8 (internal quotation omitted). A narrowly targeted approach to avoiding statelessness also would create serious policy and administrative problems. As a policy matter, it would discourage non-citizen fathers in *jus sanguinis* nations from legitimating their children at birth, because the act of legitimation would trigger a grant of foreign citizenship to the child, thus precluding United States citizenship under this approach. See *Schneiderman* v. *United States*, 320 U.S. 118, 122 (1943) ("By many [American citizenship] is regarded as the highest hope of civilized men."). The United States would in effect be intervening in the parental decision whether a foreign-born child

should be legitimated, and weighting the scales *against* legitimation. See generally *Lehr*, 463 U.S. at 266 n.25 ("It has long been accepted that illegitimate children whose parents never marry are 'at risk' economically, medically, emotionally, and educationally.").

As an administrative matter, requiring government officials to attempt to determine whether a foreign-born child would be stateless but for the availability of American citizenship would create problems of proof and complicate approval or denial of applications for citizenship under the INA. The State Department estimates that there are approximately 3 million United States citizens living abroad, and Congress was particularly concerned with easing the administrative burden associated with processing requests by these citizens and by persons seeking to enter the United States when it adopted the 1986 amendments. See S. Rep. No. 916, 99th Cong., 2d Sess. 2 (1986).

It is similarly unclear how the government could efficiently administer a law of the sort suggested by the dissenters in *Miller*, who noted that Congress could confer citizenship "only on children who have at least minimal contact with citizen parents during their early and formative years." 523 U.S. at 470 (Ginsburg, J., dissenting) (internal quotation omitted). As already explained, moreover, the decisions of this Court have repeatedly confirmed that legislatures may attach significance to an unwed father's formal recognition of a child born out of wedlock, and may make such a formal recognition a prerequisite for claiming a status equal to that of the child's mother. *Lehr*, 463 U.S. at 261-268 (enrollment in putative father registry); *Parham*, 441 U.S. at 355-356 (opinion of Stewart, J.) (legitimation a prerequisite to father's suit for wrongful death of child born out of wedlock); see also *Quilloin*, 434 U.S. at 256 (same); *Lalli* v.

Lalli, 439 U.S. 259 (1978) (illegitimate child must obtain order of filiation to inherit from father).[23]

Finally, we note the potentially far-reaching implications of the constitutional rule sought by petitioners. If this Court were to find that Congress may not treat the parental relationship of unwed citizen fathers differently than the parental relationship of unwed citizen mothers in the context of immigration and naturalization, where the legislature has particularly broad discretion, there surely would be a flood

[23] For the reasons stated here, the distinctions drawn in Section 1409 would be constitutional even if, contrary to our submission, they were subject to the scrutiny ordinarily given to statutes in the domestic context. This Court's decisions in *Lehr*, *supra*, and *Parham*, *supra*, establish that the different legal situations of unwed fathers and unwed mothers make it permissible to require those fathers, when they invoke Section 1409(a), to establish a formal and legally recognized paternal relationship with their child while the child is still a minor, notwithstanding that unwed mothers are not required to do so under Section 1409(a). See generally pp. 37-42, *supra*. Also as discussed above, Congress's decision to afford unwed mothers, through Section 1409(c), the benefit of a residency requirement that is in some cases more generous than the residency requirement that applies to fathers and married mothers under Sections 1401 and 1409(a), is "substantially related to the achievement of" the "important governmental objective[]" of avoiding statelessness. *United States* v. *Virginia*, 518 U.S. 515, 533 (1996) (quoting *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 724 (1982)). Neither petitioners, nor their amici, nor the dissenting Justices in *Miller*, have suggested how Congress's concern for lessening the incidence of statelessness could be addressed without extending more generous terms for citizenship to the children of unwed mothers, except perhaps by overriding the generally applicable parental residence requirements that this Court approved in *Bellei*, 401 U.S. at 834-835. Finally, even under heightened scrutiny, in the unique context of the naturalization of a child born abroad—which implicates foreign relations, birth on foreign soil, and (here) one parent who is a citizen of a foreign country—particular weight should be given to Congress's assessment of the legal and factual context abroad, and its judgment concerning the importance of the governmental objectives to be pursued and the particular considerations underlying the means it has chosen to achieve those objectives. Cf. *Rostker* v. *Goldberg*, 453 U.S. 57, 64-68 (1981) (discussing deference due to legislative judgments regarding military affairs).

of litigation contending that the States must revise their laws—including adoption, inheritance, wrongful death, and residency laws—that similarly distinguish between these two categories of relationships.[24] See also 42 U.S.C. 666(a)(5) (Supp. IV 1998) (requiring States, as a condition of receiving federal child-support enforcement funds, to permit establishment of paternity at any time before the child reaches age 18 and to establish other procedures for acknowledging or proving paternity); *Blessing* v. *Freestone*, 520 U.S. 329, 333 (1997) (noting that to receive federal funds, a State must "establish a comprehensive system to establish paternity"). The fact that petitioners' arguments would apply to myriad state-law counterparts of Section 1409 is additional reason to proceed with caution in this case.

II. EVEN IF THE DISTINCTIONS DRAWN BY SECTION 1409 WERE UNCONSTITUTIONAL, NGUYEN WOULD NOT BE ELIGIBLE FOR CITIZENSHIP

Even if this Court were to determine that the distinctions between unwed fathers and unwed mothers drawn in Sec-

[24] For example, the laws of a number of States provide that for purposes of intestate succession, a child born out of wedlock is the child of the natural mother in all cases, but is the child of the natural father only if some formal relationship between the father and the child (such as legitimation, a judicial determination of paternity, or an open acceptance of the child) was established during the father's lifetime. See, *e.g.*, Ala. Code §§ 26-11-2 (1992), 43-8-48 (1991); Ark. Code Ann. § 28-9-209 (Michie 1987); Conn. Gen. Stat. Ann. § 45a-438b (West 1993 & Supp. 2000); Del. Code Ann. tit. 12, § 508 (1995), tit. 13 §§ 1301, 1304 (1999); Idaho Code § 15-2-109 (1979); La. Rev. Stat. Ann. 9:392 (West 2000); Me. Rev. Stat. Ann. tit. 18-A, § 2-109 (West 1998); Miss. Code Ann. § 91-1-15 (1999); Mo. Ann. Stat. § 474.060 (West 1992); Neb. Rev. Stat. § 30-2309 (1995); S.C. Code Ann. § 62-2-109 (Law. Co-op. 1987 & Supp. 1999); Tenn. Code Ann. § 31-2-105 (1984 & Supp. 1999); Va. Code Ann. § 64.1-5.1 (Michie 1999). Some of the state statutes bar only a father's inheritance from the unrecognized child. In other States, the bar applies as well to inheritance by the child, from the father.

tion 1409 are unconstitutional, petitioners still cannot prevail. As Justice Scalia explained in *Miller*, the relief petitioners seek—a judicial declaration that Nguyen is a citizen of the United States—would not be an appropriate exercise of this Court's remedial powers. See 523 U.S. at 452-459 (Scalia, J., concurring in the judgment); see also *id.* at 451 (O'Connor, J., concurring in the judgment) (noting "the potential problems with fashioning a remedy for [Miller's] injury"); *id.* at 445 n.26 (opinion of Stevens, J.) (not reaching the remedy issue). For that additional and independent reason, the judgment below should be affirmed.

Petitioners argue (Br. 33) that Section 1409(a)(3) and (4) should be severed from the remainder of Section 1409, so that Section 1409(a) would impose essentially no restrictions on eligibility for citizenship beyond those required for the child of a married citizen parent to become a citizen. Petitioners rely primarily upon the INA's general severability clause. See Br. 32-33. Even in a case that does not implicate Congress's naturalization power, such a provision "is an aid merely; not an inexorable command." *Reno* v. *ACLU*, 521 U.S. 844, 885 n.49 (1997) (internal quotation marks omitted). The question is, "What was the intent of the lawmakers?," *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 312 (1936), and the answer "will rarely turn on the presence or absence of such a clause." *United States* v. *Jackson*, 390 U.S. 570, 585 n.27 (1968). The remedy proposed by petitioners here would "confer[] upon the statute a positive operation beyond the legislative intent, and beyond what any one can say [Congress] would have enacted" if it had known that Section 1409 contained a constitutional defect. *Spraigue* v. *Thompson*, 118 U.S. 90, 95 (1886).

Congress has never expressed an intent to convey statutory citizenship to foreign-born children of unwed citizen fathers on the same terms as to children born to married parents outside the United States. To the contrary, since

1940, when Congress first addressed the issue, it has *always* imposed the additional requirement of a formal paternal relationship during minority upon the former group of children. The lawfulness of Congress's distinction between fathering a legitimate child and fathering a child out of wedlock is undisputed in this case. Cf. *Quilloin*, 434 U.S. at 256 ("Under any standard of review," a State may take into consideration that an unwed father has "never exercised actual or legal custody over his child."). Allowing children of unwed citizen fathers to obtain statutory citizenship on substantively the same terms as legitimate children, as petitioners propose, would obliterate Congress's clearly articulated distinction between the two classes.

Petitioners' proposed remedy, moreover, would not cure the equal protection problem they purport to identify. If Section 1409(a)(3) and (4) were excised, unwed citizen fathers still would have to show that they were physically present in the United States for five years before the child's birth, in accordance with Section 1401(g) (as incorporated by Section 1409(a)). Unwed citizen mothers, however, could secure citizenship for their children under Section 1409(c) by showing that they were in the United States for one year. To remedy the allegedly unconstitutional preference for unwed citizen mothers, the Court would need to: (1) strike Section 1409 entirely (thus removing the provision that allows children born abroad out of wedlock to claim citizenship at birth and leaving resolution of the issue to Congress, as was the case in 1940); (2) make the children of both unwed citizen mothers and unwed citizen fathers subject to the full requirements of Section 1409(a) (which, like the first option, would not benefit petitioners); or (3) hold the children of both unwed citizen mothers and unwed citizen fathers to the lesser requirements of Section 1409(c). See *Heckler* v. *Mathews*, 465 U.S. 728, 738 (1984) (court sustaining an equal protection challenge should remove the challenged disparity

or extend it to disfavored class). In the context of a statute conferring citizenship, the third remedy (like the remedy proposed by petitioners) would be inappropriate, meaning that petitioners would not be entitled to relief under any circumstances.

First, as we have discussed, the area of statutory citizenship is one in which congressional power is at its peak, and judicial authority severely circumscribed. Because "[n]o alien has the slightest right to naturalization unless all statutory requirements are complied with" (*Ginsberg*, 243 U.S. at 475), courts should be particularly reluctant to supply remedial solutions that go beyond what Congress has expressly authorized. Consistent with that principle, *INS* v. *Pangilinan*, 486 U.S. 875 (1988), established that a federal court has no equitable power to confer citizenship on a litigant as a remedy for a governmental violation of a statute under which he or she might otherwise have qualified for naturalization. *Id.* at 882-885. The Court explained that when Congress has set specific statutory limits on a naturalization provision, "[n]either by application of the doctrine of estoppel, nor by invocation of equitable powers, nor by any other means does a court have the power to confer citizenship in violation of [those] limitations." *Id.* at 885.

Second, striking "burdens" imposed by Section 1409(a) would confer citizenship (presumably retroactively) on thousands of foreign-born children who have no connection to this country other than a blood relationship to a citizen father they have never known or even seen. See *Heckler*, 465 U.S. at 739 n.5 (court should "consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation"). Applying Section 1409(c) to unwed citizen fathers would enable children who have no actual or legally recognized relationship with any United States citizen to obtain citizenship. Nonsensically, those children could obtain citizenship more easily than

children who are born in wedlock to citizen fathers and their non-citizen spouses, to whom the requirements of Section 1401(g) apply. Indeed, a child born out of wedlock to a citizen father and non-citizen mother could obtain citizenship under circumstances that would not permit the foreign-born child of two American citizens to be a citizen at birth. Compare 8 U.S.C. 1401(c) (imposing residency requirement on one citizen parent) with 8 U.S.C. 1409(c) (requiring only physical presence in the United States). Such consequences plainly would do violence to congressional intent.[25]

Finally, a remedial expansion of eligibility for citizenship would be extraordinary because of questions concerning its irreversibility. Congress could at least override, through constitutionally valid legislation, a judicial remedy that equalized unwed citizen fathers and unwed citizen mothers by prospectively eliminating the preferential terms of Section 1409(c) or by eliminating Section 1409 altogether. But a different question would arise concerning the citizenship of persons who might lay claim to it as a result of this Court's decisions. Once properly conferred, citizenship may not normally be rescinded by legislative action. See *Afroyim* v. *Rusk*, 387 U.S. 253 (1967). The potential inability of Congress to effectuate its intent in the face of inconsistent remedial action by this Court, and particularly remedial action that had retroactive application to persons born under the Act of 1952 or even 1940, is an additional reason to prefer narrowing Section 1409 to expanding it.

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[25] Although it is the more permissible remedy, nullifying the challenged benefits of Section 1409(c) also would be an unsatisfactory result. It would subject the children of unwed citizen mothers to a substantially enhanced parental residency requirement, with a concomitant increase in the risk of statelessness, and would give rise to perplexing administrative questions of what action a citizen mother should have taken by the time her child turns 18 in order to satisfy the legitimation or acknowledgment requirement of Section 1409(a)(4).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 8, Clause 4 of the United States Constitution provides in pertinent part:

> The Congress shall have Power * * * [t]o establish an uniform Rule of Naturalization * * * throughout the United States.

2. The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law.

3. Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

* * * * *

4. Section 301 of the Immigration and Nationality Act (INA), ch. 477, 66 Stat. 235, as amended and presently in force, 8 U.S.C. 1401, provides:

Nationals and citizens of United States at birth

The following shall be nationals and citizens of the United States at birth:

(a) a person born in the United States, and subject to the jurisdiction thereof;

(b) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: *Provided*, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property;

(c) a person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has had a residence in the United States or one of its outlying possessions, prior to the birth of such person;

(d) a person born outside of the United States and its outlying possessions of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year prior to the birth of such person, and the other of whom is a national, but not a citizen of the United States;

(e) a person born in an outlying possession of the United States of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year at any time prior to the birth of such person;

(f) a person of unknown parentage found in the United States while under the age of five years, until shown, prior to his attaining the age of twenty-one years, not to have been born in the United States;

(g) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years; *Provided*, That any periods of honorable service in the Armed Forces of the United States, or periods of employment with the United States Government or with an international organization as that term is defined in section 288 of title 22 by such citizen parent, or any periods during which such citizen parent is physically present abroad as the dependent unmarried son or daughter and a member of the household of a person (A) honorably serving with the Armed Forces of the United States, or (B) employed by the United States Government or an international organization as defined in section 288 of title 22, may be included in order to satisfy the physical-presence requirement of this paragraph. This proviso shall be applicable to persons born on or after December 24, 1952, to the same extent as if it had become effective in its present form on that date; and

(h) a person born before noon (Eastern Standard Time) May 24, 1934, outside the limits and jurisdiction of the United States of an alien father and a mother who is a citizen of the United States who, prior to the birth of such person, had resided in the United States.

5. Section 309 of the Immigration and Nationality Act (INA), ch. 477, 66 Stat. 238, as amended and presently in force, 8 U.S.C. 1409, provides in pertinent part:

Children born out of wedlock

(a) The provisions of paragraphs (c), (d), (e), and (g) of section 1401 of this title, and of paragraph (2) of section 1408 of this title, shall apply as of the date of birth to a person born out of wedlock if—

(1) a blood relationship between the person and the father is established by clear and convincing evidence,

(2) the father had the nationality of the United States at the time of the person's birth,

(3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and

(4) while the person is under the age of 18 years—

(A) the person is legitimated under the law of the person's residence or domicile,

(B) the father acknowledges paternity of the person in writing under oath, or

(C) the paternity of the person is established by adjudication of a competent court.

* * * * *

(c) Notwithstanding the provision of subsection (a) of this section, a person born, after December 23, 1952, outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year.

6. Section 309 of the INA, ch. 477, 66 Stat. 238, 8 U.S.C. 1409 (1952), provided in pertinent part:

Children born out of wedlock

(a) The provisions of paragraphs (3)-(5) and (7) of section 1401(a) of this title, and of paragraph (2) of section 1408 of this title shall apply as of the date of birth to a child born out of wedlock on or after the effective date of this chapter, if the paternity of such child is established while such child is under the age of twenty-one years by legitimation.

* * * * *

(c) Notwithstanding the provision of subsection (a) of this section, a person born, on or after the effective date of this chapter, outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been

physically present in the United States or one of its outlying possessions for a continuous period of one year.

7. Section 205 of the Nationality Act of 1940, ch. 876, 54 Stat. 1139-1140, provides:

The provisions of section 201, subsections (c), (d), (e), and (g), and section 204, subsections (a) and (b), hereof apply as of the date of birth, to a child born out of wedlock, provided the paternity is established during minority, by legitimation, or adjudication of a competent court.

In the absence of such legitimation or adjudication, the child, whether born before or after the effective date of this Act, if the mother had the nationality of the United States at the time of the child's birth, and had previously resided in the United States or one of its outlying possessions, shall be held to have acquired at birth her nationality status.

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No. 99-2071

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In The

Supreme Court of the United States

TUAN ANH NGUYEN AND
JOSEPH ALFRED BOULAIS,

Petitioners,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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2917

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

ARGUMENT 1

A. Section 1409's Sex-based Classifications Must Be Struck Down Absent An "Exceedingly Persuasive" Justification For Such Classifications Under Current Constitutional Standards 1

1. The Sex-based Classifications In § 1409 And Its Precursors Reflect Deep-seated Stereotypes About Men's and Women's Parenting Roles 1

2. Concerns Over Fathers' Legal Relationships to Their Children Do Not Justify the Sex Discrimination of § 1409 4

3. Concerns Over Statelessness and Dual Citizenship Do Not Justify the Gender Discrimination of § 1409 7

4. Invalidation of § 1409 Would Not Lead To A Flood of Litigation Over Unrelated Statutes 10

B. Congress's Plenary Power Over Immigration Is Not So Broad As To Shield From Review A Statute Involving Citizenship at Birth 12

C. The Modest Remedy Sought By Petitioners Effectuates Congress's Intent And Is Fully Consistent With This Court's Remedial Authority 15

CONCLUSION 20

TABLE OF AUTHORITIES

FEDERAL CASES

Afroyim v. Rusk,
387 U.S. 253 (1967) 9

Alaska Airlines, Inc. v. Brock,
480 U.S. 678 (1987) 16

Caban v. Mohammed,
441 U.S. 380 (1979) 11, 19

Califano v. Goldfarb,
430 U.S. 199 (1976) 9

Clark v. Jeter,
486 U.S. 456 (1988) 5

Craig v. Boren,
429 U.S. 190 (1976) 9

Fiallo v. Bell,
430 U.S. 787 (1977) 14, 15

INS v. Chadha,
462 U.S. 919 (1983) 16

INS v. Pangilinan,
486 U.S. 875 (1988) 16

J.E.B v. Alabama, ex rel T.B.,
511 U.S. 127 (1994) 5, 9, 19

Kleindeinst v. Mandel,
408 U.S. 753 (1972) 14

Kwong Hai Chew v. Colding,
344 U.S. 590 (1953)..... 15

Landon v. Plasencia,
459 U.S. 21 (1982)..... 15

Lehr v. Robertson,
463 U.S. 248 (1983)..... 10, 11, 12

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992)..... 8

Metro Broadcasting, Inc. v. FCC,
497 U.S. 547 (1990)..... 19

Miller v. Albright,
523 U.S. 420 (1998)..... 2, 8, 12, 13, 17

Mississippi University for Women v. Hogan,
458 U.S. 718 (1982)..... 20

Orr v. Orr,
440 U.S. 268 (1979)..... 7

Parham v. Hughes,
441 U.S. 347 (1979)..... 7, 10

Planned Parenthood of Southeastern Pa. et al v. Casey,
505 U.S. 897 (1992)..... 3

Quilloin v. Walcott,
434 U.S. 246 (1978)..... 11

Rivera v. Minich,
483 U.S. 574 (1987)..... 18

Rogers v. Bellei,
401 U.S. 815 (1971)..... 13

Romer v. Evans,
517 U.S. 620 (1996)..... 14

United States v. Ahumada-Aguilar,
189 F.3d 1121 (9th Cir. 1999)..... 19

United States v. Virginia,
518 U.S. 515 (1996)..... 2, 4, 9, 14

Vance v. Terrazas,
444 U.S. 252 (1980)..... 9

Welsh v. United States,
398 U.S. 333 (1970)..... 17

FEDERAL STATUTES

8 U.S.C. § 1101(a)(23)..... 12

8 U.S.C. § 1401(g)..... 1, 8

8 U.S.C. § 1409..... *passim*

Immigration and Nationality Act, ch. 477 § 309, 66 Stat. 163, 238-39 (1952)..... 3

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STATE STATUTES

Ala. Code § 43-8-48 6

Ariz. Rev. Stat. § 14-2114 6

Ariz. Rev. Stat. § 25-806 6

Colo. Rev. Stat. § 15-11-114 6

Del. Code Ann. tit. 12, § 508 6

Ga. Code Ann. § 53-2-3 6

Idaho Code § 15-2-109 6

Kan. Stat. Ann. § 38-1113 6

Kan. Stat. Ann. § 59-501 6

Me. Rev. Stat. tit. 18-A § 2-109 6

Minn. Stat. Ann. § 257.54 6

Minn. Stat. Ann. § 524.2-114 6

Mo. Rev. Stat. § 474.060 6

Mont. Code. Ann. § 40-6-104 6

Mont. Code. Ann. § 72-2-124 6

Neb. Rev. Stat. § 30-2309 6

N.H. Rev. State Ann. § 561:4 6

N.J. Stat. Ann. § 3B:5-10 6

N.M. Stat. Ann. § 45-2-114 6

N.D. Cent. Code § 14-17-03 6

N.D. Cent. Code § 30.1-04-09 6

Pa. Cons. Stat. § 2107 6

R.I. Gen. Laws §33-1-8 6

Tenn. Code Ann. § 31-2-105 (1999) 6

Wash. Rev. Code Ann. § 11.04.08 6

Wash. Rev. Code Ann. § 26.26.030 6

MISCELLANEOUS

Administration of the Immigration and Nationality Laws: Hearing Before the Subcomm. on Immigration, Refugees and Int'l Law, 99th Cong. (1986) 3

Kristen Collins, *Note, When Fathers' Rights Are Mothers' Duties: The Failure Of Equal Protection in Miller v. Albright*, 109 Yale L.J. 1669 (2000) 2

Jesse Dukeminer & Stanley M. Johanson, *Wills, Trusts & Estates* (5th ed. 1995) 6

The First Quarterly Report of the Attorney General to the President and the Cabinet Council on Legal Policy as Required by Executive Order 12336 (1982) 2

House Committee on Immigration and Naturalization, A Report Proposing A Revision and Codification of the Nationality Laws of the United States, Part One: Proposed Code with Explanatory Comments, 76th Cong., 1st Sess. (Comm. Print 1939) 3

Anne Keegan, *Children of Vietnam Find Few Fathers at U.S. Doors*, Chi. Trib., May 13, 1987 19

William H. Rehnquist, *All the Laws But One: Civil Liberties in Wartime* (1998) 7

Relating to the Naturalization and Citizenship Status of Certain Children of Mothers Who Are Citizens of the United States, and Relating to the Removal of Certain Distinctions in Matters of Nationality: Hearings Before the House Comm. on Immigration and Naturalization, 72nd Cong. (1932) 3

Restatement (Second) of Conflicts of Laws 10

To Revise and Codify the Nationality Laws of the United States into a Comprehensive Nationality Code: Hearings Before the Comm. on Immigration and Naturalization, 76th Cong. 62 (1945 reprint) 3

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ARGUMENT

A. Section 1409's Sex-based Classifications Must Be Struck Down Absent An "Exceedingly Persuasive" Justification For Such Classifications Under Current Constitutional Standards

1. The Sex-based Classifications In § 1409 And Its Precursors Reflect Deep-seated Stereotypes About Men's And Women's Parenting Roles

Beginning with its revision of the Question Presented, Resp't Br. I, Respondent attempts to obscure the fundamental issue before this Court, i.e., whether the differential treatment of mothers and fathers under 8 U.S.C. § 1409 constitutes sex discrimination violating the equal protection component of the Due Process Clause of the Fifth Amendment.[1] Contrary to the Government's formulation, this is not simply a case requiring evaluation of "certain conditions" placed on fathers. *Id.* Rather, § 1409(a) places greater burdens on unwed fathers than on unwed mothers who seek citizenship for their foreign-born, non-marital children. This classification differentiates between parents on the basis of their sex, and creates a formal, government-sponsored barrier impeding fathers from transmitting citizenship. It reinforces stereotypes based on the antiquated rule that women alone have responsibility for non-marital children.[2]

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[1] The Government also unilaterally revises Petitioners' claims by adding a challenge to the physical presence requirements of §§ 1401(g) and 1409(c), brushing aside the challenge to § 1409(a)(3), and labeling Petitioners' facial challenge as an "as applied" challenge. Resp't Br. 31-32. The Court should reject these attempts to reshape the claims and the Question Presented here.

[2] Because Petitioners do not raise an equal protection challenge based on differential treatment of married and unmarried parents, that issue is not before the Court. Accordingly, the Government's assertion that differences based on illegitimacy are "undisputed," Resp't Br. 47, is a mischaracterization. It is true, however, that the remedy sought here –

The Government itself has previously recognized the sex discrimination in § 1409. In 1982, the United States Attorney General reported on federal statutes that "needlessly provid[e] for unequitable treatment of the sexes," identifying § 1409 as a "sex-based statute[] requiring corrective action by Congress." The First Quarterly Report of the Attorney General to the President and the Cabinet Council on Legal Policy as Required by Executive Order 12336, app. B *in* 128 Cong. Rec. 19802, 19809 (1982). Indeed, in its brief in *United States v. Virginia*, 518 U.S. 515 (1996) [hereinafter *VMI*], the United States argued that "formal sex-based barriers, and the stereotypes that support them have no place in our modern Constitution." Brief for the Cross-Respondent at 9, United States v. Virginia, 518 U.S. 515 (1996) (No. 94-2107). According to the Government, the Virginia Military Institute's men-only admissions policy – reflecting prevailing social norms when it was adopted in 1839 – "[is] patently illegitimate today." *Id.* at 19. This Court agreed, concluding that the Nation's "long and unfortunate history of sex discrimination" does not justify more discrimination now and in the future, but supports "skeptical scrutiny of official action denying rights or opportunities based on sex." *VMI*, 518 U.S. at 531 (citations omitted).

Here, however, the Government urges the Court to embrace the sex-based categories of § 1409 based on 19th century stereotypes. *See* Kristen Collins, Note, *When Fathers' Rights Are Mothers' Duties: The Failure Of Equal Protection in Miller v. Albright*, 109 Yale L.J. 1669, 1682-92 (2000) (explaining how *coverature* rules were reflected in text, implementation and interpretation of citizenship laws); *Miller v. Albright*, 523 U.S. 420, 460-65 (1998) (Ginsburg, J., dissenting) (detailing history of sex discrimination in

equal treatment of unwed mothers and fathers seeking to establish their children's citizenship at birth – will not disturb Congress's ability to distinguish between married and unmarried parents for purposes of citizenship insofar as permitted under existing law.

citizenship laws). Contrary to the Government's assertions that Congress set out to equalize the legal status of married and unmarried fathers by adopting § 405 of the Nationality Act of 1940, Congress simply codified the State Department's existing practice of deeming non-legitimated children of citizen mothers and legitimated children of citizen fathers to be citizens at birth. *See House Committee on Immigration and Naturalization, A Report Proposing A Revision and Codification of the Nationality Laws of the United States, Part One: Proposed Code with Explanatory Comments*, 76th Cong., 1st Sess., 17-18 (Comm. Print 1939) (explaining that proposed statutory section for non-marital children reflected State Department practice); *To Revise and Codify the Nationality Laws of the United States into a Comprehensive Nationality Code: Hearings Before the Comm. on Immigration and Naturalization*, 76th Cong. 62 (1945 reprint) (Statement of R.W. Flournoy, Assistant to the Legal Adviser, State Department) (same). This scheme privileged a father's ability to transmit his citizenship over a mother's because the moment a father legitimated the child, the mother lost her ability to transmit her citizenship. *See* Nationality Act of 1940, ch. 876, § 205, 54 Stat. 1137, 1139-40. Further, this scheme assured that mothers retained all of the "burdens" of parenthood for non-marital children. *See, e.g., Relating to the Naturalization and Citizenship Status of Certain Children of Mothers Who Are Citizens of the United States, and Relating to the Removal of Certain Distinctions in Matters of Nationality: Hearings Before the House Comm. on Immigration and Naturalization*, 72nd Cong. 3-7 (1932) (Statement of Chairman, House Comm.) (noting that "[i]n the present law the burden is carried by the mother of an illegitimate child").[3]

[3] The INA incorporated this scheme regarding citizenship for non-marital children. *See* Immigration and Nationality Act, ch. 477 § 309, 66 Stat. 163, 238-39 (1952). Similarly, in 1986 Congress adjusted the provision for fathers but retained the law's sex-based classifications. *Administration of*

This Court has long since rejected the patriarchal notions of family on which these classifications rest. *See Planned Parenthood of Southeastern Pa. et al v. Casey* 505 U.S. 897 (1992) (rejecting "common-law understanding of a woman's role within the family"). As sex-based classifications, the challenged provisions of § 1409 cannot survive heightened scrutiny absent an "exceedingly persuasive justification." *VMI*, 518 U.S. at 533. Aside from generalized assertions regarding men's and women's parenting capacities, the Government offers three additional rationales for the sex-based categories of § 1409. The first — to ensure that non-marital children born abroad develop a close connection to their citizen parent and thus to the United States during their minority — has been thoroughly discussed in prior submissions. In brief, this purported goal is a post hoc rationale that, even if accepted at face value, does not justify discrimination based on sex. [4] Pet. Br. 16-21. The second justification offered by the Government for the sex-based classifications of § 1409 is the claim that a father must take affirmative steps to establish a legal relationship to his child. Resp't Br. 32. Finally, the Government argues that the sex-based classifications are needed to avoid statelessness. *Id.* at 42-44. As set out below, the latter two rationales do not provide the "exceedingly persuasive justification" required to sustain such sex-based classifications.

2. Concerns Over Fathers' Legal Relationships to Their Children Do Not Justify the Sex Discrimination of § 1409

the Immigration and Nationality Laws: Hearing Before the Subcomm. on Immigration, Refugees and Int'l Law, 99th Cong. 22 (1986).

[4] The legislative history of § 1409 nowhere mentions promotion of "close family ties" as a motivating factor in the adoption of § 1409. National Women's Law Center *Amicus* Br. 23-25 [hereinafter NWLC Br.].

According to the Government, the sex discrimination of § 1409 is justified because the statute assures that an unwed citizen father has the same "recognized and formal relationship" as a citizen mother. Resp't Br. 33-34. But the Government never explains exactly what this "recognized and formal relationship" is, or why a mother need not show anything other than "the fact of maternity" to transmit citizenship while a father must show much more than the fact of his paternity.

Even if the "legal relationship" between parent and child were pertinent to citizenship, the Government is simply wrong that unmarried fathers have no legal relationship to their children. State laws regarding out-of-wedlock fathers' parental status have changed dramatically in the past six decades. The decided trend has been to recognize the importance of fathers' responsibilities to their non-marital children, and to develop laws that ensure that children receive the benefits of parentage from their fathers rather than leaving it up to the father to take affirmative actions to establish his legal responsibility. Given these new developments, the state of the law in 1940 or even 1986 is irrelevant to the constitutional question before this Court. As this Court has repeatedly held, the constitutionality of a law challenged under the Equal Protection Clause is evaluated in light of conditions pertaining at the time of the challenge. *See, e.g., Clark v. Jeter*, 486 U.S. 456, 465 (1988) (taking current statutory and technological developments into account in evaluating government interest); *J.E.B v. Alabama, ex.rel T.B.*, 511 U.S. 127, 142 (1994) (rejecting governmental interest based on historical stereotypes).

This trend towards putting all non-marital children on equal footing, regardless of the sex of their parent, is most marked in the areas of law where, as here, children are the ultimate beneficiaries (or potential losers) under a system that ties their fates to fathers' unilateral actions, i.e., child support and inheritance. Thus, all states have child support

enforcement systems in place where the key factor triggering parental responsibility is paternity or maternity establishment, not legitimation, and all have abandoned gender-based common law principles governing child support. *See* NWLC Br. 19, 25-27.

Likewise, following the same rationale, many states have abandoned sex-based classifications in the analogous area of inheritance. Nine states make no gender-based distinctions in intestate succession statutes governing inheritance rights of children born out of wedlock.[5] Importantly, all states, even those that retain some sex-specific provisions, take an approach that, unlike § 1409(a), shields non-marital children from the exigencies of parental behavior. Like child support, the key is paternity establishment - once paternity is established, with or without the father's voluntary participation, a child may inherit from his unwed father.[6] Moreover, many states impose no time limit on paternity establishment for the purposes of inheritance.[7] As with

[5] *See, e.g.*, Ariz. Rev. Stat. § 14-2114, §25-806 (LEXIS, through 2000); Colo. Rev. Stat. § 15-11-114 (LEXIS, through 1999); Kan. Stat. Ann. §59-501, § 38-1113 (LEXIS, through 1999 Sess.); Minn. Stat. Ann. § 524.2-114, § 257.54 (LEXIS, through 1999 Sess.); N.M. Stat. Ann., § 45-2-114 (LEXIS, through 1999 Supp.); Mont. Code Ann. § 72-2-124, § 40-6-104 (LEXIS, through Oct. Sess. 1999); N.D. Cent. Code § 30.1-04-09, § 14-17-03 (LEXIS, through 1999 Reg. Sess.); R.I. Gen. Laws §33-1-8 (LEXIS, through 1999 Sess.); Wash. Rev. Code Ann. § 11.04.08, § 26.26.030 (LEXIS, through ch. 1, Reg. Sess. 2000).

[6] *See* statutes *cited in* notes 5 *infra*, 7 *supra*. *See also* Jesse Dukeminer & Stanley M. Johanson, *Wills, Trusts & Estates* 106-7 (5th ed. 1995).

[7] *See, e.g.*, N.J. Stat. Ann. § 3B:5-10 (LEXIS, through P.A. 1999, ch. 306) (providing that parentage act time limit of five years post-majority to establish parent-child relationship does not apply to inheritance). Other states provide that one way a child may inherit from an unwed father is by establishing paternity after death by clear and convincing evidence. Ala. Code § 43-8-48 (LEXIS, through 1999); Ga. Code Ann. § 53-2-3 (LEXIS, through 1999); Idaho Code § 15-2-109 (LEXIS, through 1999); Me. Rev. Stat. tit. 18-A § 2-109 (LEXIS, through 1999 Supp.); Mo. Rev. Stat. § 474.060 (LEXIS, through 1999); Neb. Rev. Stat. § 30-2309 (LEXIS, through 2000); N.H. Rev. State Ann. § 561:4 (LEXIS, through 1999 Sess.); Pa. Cons. Stat. § 2107 (LEXIS, through 1999); Tenn. Code Ann. § 31-2-105 (1999); Del. Code Ann. tit. 12, § 508 (LEXIS, through 1999) (using preponderance of evidence standard for same).

citizenship, there is no reason to put an expiration date on a parent's ability to transmit, and a child's ability to receive, the benefit of an inheritance.

The notion that Congress must take state law—especially discriminatory state law—into account in drafting its federal citizenship law simply has no precedent. On the contrary, this "one discrimination justifies another" approach has been rejected by courts and commentators. *See, e.g., Orr v. Orr*, 440 U.S. 268, 280 n. 9 (1979) (argument that common law discrimination justifies sex-based classifications "reveals its own weakness"); *Parham v. Hughes*, 441 U.S. 347, 361 n. 2 (1979) (White, J., dissenting) ("It is anomalous, at least, to assert that sex discrimination in one statute is constitutionally invisible because it is tied to sex discrimination in another statute, without subjecting either of these classifications on the basis of sex to an appropriate level of scrutiny."); William H. Rehnquist, *All the Laws But One: Civil Liberties in Wartime* 207 (1998) (noting, in analyzing *Hirabayashi v. United States*, 320 U.S. 81 (1943), that "[t]here is considerable irony, of course, in relying on previously existing [race-based] laws discriminating against Japanese immigrants to conclude that still further disabilities should be imposed upon them . . ."). Thus, discriminatory state laws provide no safe harbor for the Government in defending its own sex-based classifications under § 1409(a).

3. Concerns Over Statelessness and Dual Citizenship Do Not Justify the Gender Discrimination in § 1409

The Government's attempt to excuse the sex-based classifications of § 1409 by reference to sex-based foreign laws fares no better. As a threshold matter, the Government

concedes that Congress's concerns regarding statelessness provide an underpinning only for the less stringent physical presence requirement for non-marital mothers of § 1409(c). Resp't Br. 18-19, 42, 44 n. 23. It cannot be overemphasized, given the Government's erroneous attention to this issue, that the physical presence requirements of §§ 1409(c) and 1401(g) are not challenged in this case. Because Joseph Boulais meets the physical presence requirements of both provisions, he can demonstrate no harm as a result of the requirement and therefore has no standing to challenge it. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Indeed, the Question Presented refers to § 1409(a) and does not cite the physical presence requirement of § 1401(g). Likewise, the court below concluded that the challenge here was limited to §§ 1409(a)(3) and (4). Pet. App. 12a n. 8.[8] For similar reasons, a majority of this Court in *Miller* also acknowledged that the physical presence requirement of § 1401(g) was not at issue in that case. *Miller*, 523 U.S. at 430; *id.* at 472 (Breyer, J. dissenting). The Government's relentless focus on statelessness is a diversion.

In any event, if statelessness were the true concern, § 1409 is grossly overinclusive, because children born abroad to citizen mothers in countries with *jus soli* laws are not stateless, but gain the advantage of the shortened physical presence requirements. It is also grossly underinclusive because a child born abroad to a citizen father in a *jus sanguinis* country where citizenship passes only through fathers would be stateless but subject to the longer residency requirement.[9] There is no rational justification — much less an "exceedingly persuasive" one — for subjecting all fathers, but no mothers, to extended physical presence requirements based on the possibility that some children might be stateless if not granted citizenship through their mothers.

Congress could most effectively address the potential for statelessness not through a sex-based distinction, but through a gender-neutral rule either providing generous physical presence requirements regardless of sex or narrowly trained on statelessness. The Government itself entertains the former possibility, then rejects it simply by reasserting the stereotype on which the current law is based: that fathers will not have the same tie to their children as mothers. Resp't Br. 43. *Cf. J.E.B.*, 511 U.S. at 138 (refusing to accept "very stereotype law condemns" as defense to gender based classification). Similarly, the Government speculates that a more narrow, tailored rule applying relaxed physical presence requirements on a case-by-case basis would both discourage legitimation by foreign fathers and create administrative burdens. Resp't Br. 42-43. As to legitimation, the Government's unsupported assertion is pure hypothesis. *Cf. VMI*, 518 U.S. at 533. Likewise, the administrative problems that the Government postulates provide no convincing rationale for undermining the integrity of the citizenship laws by permitting sex discrimination. *See Califano v. Goldfarb*, 430 U.S. 199, 217 (1976); *Craig v. Boren*, 429 U.S. 190, 198 (1976).

Finally, the Government raises the issue of dual citizenship. Congress, however, has never cited this "problem" as a basis for the gender distinction at issue in

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[8] The Government ignores the Court of Appeals decision and asserts that § 1409(a)(3) is not at issue here because Nguyen was over 18 when he asserted his citizenship. Resp't Br. 9, 32. This same reasoning, however, would also bar a challenge to § 1409(a)(4), leading to the absurd result that no one whose rights were cut off by the 18-year bar would ever be able to challenge it. The Government also asserts that (a)(3) does not apply because Petitioners might have elected to proceed under the old law in order to avoid the support requirement (despite its more onerous legitimation and physical presence rules). *Id.* at 32. Even under the old law, Petitioners would still be subject to sex-based requirements violating their equal protection rights.

[9] For example, according to the State Department, in Egypt, "only males may confer citizenship." U.S. Department of State, 1999 Country Reports on Human Rights Practices: Egypt (2000), http://www.state.gov/www/global/human_rights/1999_hrp_report/egypt.html.

this case. Indeed, dual citizenship is permitted unless there is intent to renounce United States citizenship. *Vance v. Terrazas*, 444 U.S. 252, 270 (1980); *Afroyim v. Rusk*, 387 U.S. 253 (1967). The Government does not explain why dual citizenship would be a greater problem when a child born abroad has a citizen father than a citizen mother. That there might be a small number of additional children with dual citizenship if it were easier for children of citizen fathers to become citizens does not provide an "exceedingly persuasive justification" for a sex-based citizenship law.

4. Invalidation of § 1409 Would Not Lead To A Flood of Litigation Over Unrelated Statutes

Because of changes in state laws noted above – and the specific rationale behind the changes -- the Government's assertion that a ruling for Petitioners would create a "flood of litigation" is disingenuous. First, recognizing that non-marital mothers and fathers should be on equal footing in terms of transmitting citizenship at birth to their children would confirm an existing trend already apparent in state laws such as child support and inheritance where children are the ultimate beneficiaries. Because this case involves a benefit transmitted from father to child, it is readily distinguishable from examples such as adoption, child custody and domicile recited by the Government in support of its "slippery slope" argument.[10]

Similarly this case is distinguishable on this basis from *Parham v. Hughes*, 441 U.S. 347 (1979), and *Lehr v. Robertson*, 463 U.S. 248 (1983). In *Parham*, the father initiated a wrongful death action on behalf of his non-marital son. In upholding the law requiring legitimation as a prerequisite to

[10] Notably, while the common law of domicile establishes a default rule that reinforces mothers' responsibility for non-marital children, that presumption is overridden if the father is the sole caretaking parent. *See* Restatement (Second) of Conflicts of Laws, § 22 cmts. c, e (1971) (noting that if child is abandoned by mother, child takes domicile of father).

filing suit, the Court specifically noted that any burden arising from the father's inability to sue would fall exclusively on the father. 441 U.S. at 360 (Powell, J., concurring) (noting that bar to father's suit is a "disability that only he will suffer"). Likewise in *Lehr*, an unmarried father claimed an absolute right to notice and an opportunity to be heard before his child was adopted, despite his minimal involvement in his child's life. 463 U.S. at 250-252. As with *Parham*, the Court focused on the fact that a father sought to obtain benefits (the right to participate in adoption) that would inure only to the father since his involvement was not deemed to be in the child's best interest. *See Lehr*, 463 U.S. at 258, 264 n. 22. *See also Quilloin v. Walcott*, 434 U.S. 246, 254 (1978) (permitting adoption over objections of non-marital father served "best interests of the child").

Here, in contrast, the benefits or burdens of the father's inaction fall heavily on the child. While the father may accrue some benefit from uniting his family, citizenship, like inheritance or child support, is a tangible benefit to the child that is portable and that endures beyond the life of the parent. The child is the clear loser when the statutory scheme excuses a father from sharing such benefits with his child. When the scheme, as here, excuses fathers alone, and ensures that virtually all similarly situated children of unwed mothers can claim the benefit, the inequality is particularly clear. This is the motivating principle behind efforts to eliminate sex-based classifications from state laws of child support and inheritance, and it also serves as a basis for distinguishing this case from those where the benefits at issue inure exclusively or primarily to the father.[11]

[11] In addition, this case is distinguishable on its facts from *Lehr*, where the father had little relationship with the child. 463 U.S. at 252. Like the father in *Caban v. Mohammed*, 441 U.S. 380 (1979), Boulais has maintained a close relationship with his son since his infancy. *Id.* at. 393. As this Court noted in *Lehr*, "these statutes may not constitutionally be applied in

The Government's "floodgates" argument is also misguided because the concerns addressed by state law are vastly different than citizenship. State laws in the areas of adoption, inheritance, child custody, child support and wrongful death recovery must all address the problems that arise when competing claims vie for limited resources. *See Lehr*, 463 U.S. at 266 (adoption must "promote the best interests of the child, . . . protect the rights of interested third parties, and . . . ensure promptness and finality"). This circumstance requires a different approach than citizenship, and it may justify efforts by the state to create a hierarchy of claims. In contrast, there are no competing claims – and no limited resources to be apportioned – in the area of citizenship. *See also* Pet. Br. 35-36 (distinguishing *Lehr*).

B. Congress's Plenary Power Over Immigration Is Not So Broad As To Shield From Review A Statute Involving Citizenship at Birth

The Government asserts that Congress's plenary power over immigration is sufficiently broad to shield the sex-based classifications in § 1409 from "skeptical scrutiny." However, while touting the extreme deference due to Congress in the execution of its role under the Naturalization Clause of the Constitution, the Government overlooks the plain consequences of the manner in which Congress has executed this authority. As set out in Petitioners' initial brief, the Immigration & Nationality Act could not be more clear: under § 1409, once citizenship is recognized it begins "as of the date of birth." 8 U.S.C. § 1409(a). As recognized by a majority of this Court in *Miller*, this stands in sharp contrast to Congress's treatment of naturalization, which specifically provides that citizenship

---

that class of cases where the mother and father are in fact similarly situated with regard to their relationship with the child." *Lehr*, 463 U.S. at 267.

when acquired is prospective only. *Miller*, 523 U.S. at 432; *id.* at 480 (Breyer, J., dissenting); 8 U.S.C. § 1101(a)(23).

Congress's choice to accord citizenship "at birth" to certain children of citizens born outside the United States means that citizens alone – the citizen parent and the putative citizen child – are direct beneficiaries of the statute. Because citizenship at birth under § 1409 is indisputably not a constitutional right but a statutory one, Congress could change these laws to deny such citizenship under the circumstances presented here. But as written, the import of the law is clear. It would be a dramatic expansion of Congressional plenary power to deny full constitutional review to citizens or putative citizens asserting their equal protection rights under laws of which they are the sole direct beneficiaries. Further, such an expansion is not justified by the plenary power doctrine's foreign relations purpose. Pet. Br. 29; *Miller*, 523 U.S. at 480 (Breyer, J., dissenting).

Significantly, this is exactly the proposition that the Government itself advanced in *Rogers v. Bellei*, 401 U.S. 815 (1971). While the Respondents now cite *Rogers* for the proposition that the plenary power doctrine shields citizenship at birth statutes from heightened scrutiny, that argument was not made in *Rogers*. Instead, the Government treated the respondent as a citizen and specifically conceded that "due process mandates . . . would bar any arbitrary, unreasonable, **or discriminatory conditions**" on citizenship at birth status. Brief for Appellant at 21, Rogers v. Bellei, 401 U.S. 815 (1971) (No. 24) (emphasis added). The Government nevertheless argued that only rational basis review was appropriate since no basis for heightened scrutiny was advanced. This Court agreed, applying rational basis review rather than either heightened scrutiny or the more deferential "facially legitimate and bona fide reason" test that would have signaled an invocation of Congress's plenary power authority. *Rogers*, 401 U.S. at 833 (applying

rational basis standard in reviewing claim of citizen at birth). Accordingly, *Rogers* supports the proposition that statutory conditions on citizenship at birth must comport with ordinary constitutional standards.

While *Kleindeinst v. Mandel*, 408 U.S. 753 (1972), and *Fiallo v. Bell*, 430 U.S. 787 (1977), also involved citizens' claims of constitutional violations, neither involved citizenship at birth and both are distinguishable from the narrow proposition advanced here. *Kleindeinst* involved first amendment claims made by citizens who were not the direct beneficiaries of the statute at issue; the direct beneficiaries of the statute were non-immigrant visitors to the United States. *Fiallo*, in contrast, did involve some citizens directly as sponsors, but the benefit being sought in each instance was a special immigration preference – not citizenship at birth – for non-citizens, whose new immigration status would be prospective only. Thus, the deferential review exercised in both of these cases does not call into question the availability of heightened scrutiny here.[12]

Further, even if the citizenship-at-birth statute was deemed to be within the general scope of Congress's plenary authority over immigration, the plenary power that Congress enjoys is far from impermeable. Even in those

[12] Notably, this Court's jurisprudence has changed substantially since *Fiallo* was decided in 1977. The "pathmarking decisions" on sex discrimination cited in *VMI* - including *J.E.B. v. Alabama ex rel. T.B.*, *Mississippi Univ. for Women v. Hogan* and *VMI* itself – all post-date *Fiallo*. *VMI*, 518 U.S. at 531 (citations omitted). These significant developments necessarily cast a shadow on *Fiallo*'s continued persuasive value. In any event, the sex-based classifications of § 1409 would also fail under either rational basis review or the more deferential review under plenary power. This is particularly true because the benefit that § 1409 denies to fathers and their non-marital children based on impermissible and invidious sex stereotypes is a core political right – the ability to transmit and acquire citizenship without discrimination. *See, e.g., Romer v. Evans*, 517 U.S. 620, 631 (1996).

areas where Congress's power is in full force, this Court has never wholly abdicated review and indeed, in many instances, has provided ordinary constitutional review. *Fiallo* itself accepted "judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens," albeit limited responsibility. *Fiallo*, 430 U.S. at 793 n.5. Five years later, in *Landon v. Plasencia*, 459 U.S. 21, 32-33 (1982), the Court put to rest any idea that the Due Process Clause is necessarily inapplicable to aliens. *See Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953). This approach is entirely appropriate given the extraordinary nature of the plenary power doctrine, which effectively eliminates the checks and balances so necessary to the full realization of our system of government.

In contrast to this Court's measured approach, the Government's broad formulation of the plenary power doctrine would seem to shield everything from review that arguably touches on foreign relations. Petitioners' claim, however, is far more modest than the Government's characterization. It rests on the history and tradition of *jus sanguinis* citizenship, the plain language of the Immigration & Nationality Act that codifies the status of citizen at birth, and the uncontroversial proposition, accepted by the Government in its brief in *Rogers*, that the integrity of laws requires that citizens' equal protection rights be enforced. Upholding this proposition would do no damage to the immigration and naturalization plenary power that the Government seeks to protect.

C. The Modest Remedy Sought By Petitioners Effectuates Congress's Intent And Is Fully Consistent With This Court's Remedial Authority

The Government concedes that "[t]he judiciary has an unquestioned role in protecting rights accorded under the Constitution to citizens," Resp't Br. 23, but argues that a

ruling here would extend beyond the Court's proper role. As explained above, Congress has already, through the provisions of the Immigration & Nationality Act, exercised its choices about membership in the polity; this Court is called on simply to exercise judicial review consistent with those choices.

In their opening brief, Petitioners proposed a straightforward remedy to address the specific claims that §§ 1409(a)(3) and (a)(4) violate their rights under the equal protection clause. Yet ignoring the remedy actually sought by Petitioners, the Government presents a parade of unworkable "horribles" to argue that there can be no remedy. Since the Government only passingly addresses the remedy advanced by Petitioners, i.e., severance of §§ 1409(a)(3) and (a)(4), it must be presumed that the Government could find no dramatic flaw with that approach.

The Government, however, claims that severance is improper. The irrelevance of *INS v. Pangilinan*, 486 U.S. 875 (1988), is addressed at Pet. Br. 37-38. Indeed, the Government no longer seems to place much stock in the case, which bars a judicial grant of citizenship as an equitable remedy, but says nothing about the equitable remedy of severance at issue here.

Laying *Pangilinan* aside, the Government misstates the law regarding severance, which provides that when a statute contains a severability clause, the party seeking to avoid severance bears a heavy burden of showing that the clause should be ignored. *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987). Here, the Government falls far short of producing "strong evidence" that Congress would not have extended citizenship-at-birth benefits to children of non-marital mothers and fathers equally had it known that the sex-based classifications of § 1409(a) were unconstitutional. *Alaska Airlines*, 480 U.S. at 686. In fact, the legislative history suggests the opposite conclusion. The INA's severability

clause, dating from 1952, was specifically reconsidered by Congress after this Court exercised the clause in *INS v. Chadha*, 462 U.S. 919 (1983). By retaining the clause following hearings on the matter in 1983, Congress effectively reaffirmed its intention that the clause be used to its fullest extent. *See generally The Supreme Court Decision in INS v. Chadha and Its Implications for Congressional Oversight and Agency Rulemaking: Hearings Before the Subcomm. on Admin. Law and Gov't Rel. of the House Comm. on the Judiciary*, 98th Cong. (1983) (reconsidering severability clause in INA). Certainly, by that date and in the wake of *Fiallo*, the possibility that a provision of the INA might be severed under the equal protection clause would have been within Congress's contemplation.

In considering severance, this Court also examines the history and context of the provision at issue. *See Welsh v. United States*, 398 U.S. 333, 365 (1970) (Harlan, J., concurring) ("In exercising the broad discretion conferred by a severability clause it is, of course, necessary to measure the intensity of commitment to the residual policy and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation.") (citations omitted). Though the Government repeatedly suggests that abrogation is an alternative, Resp't Br. 47-48, even a casual investigation demonstrates the central history *jus sanguinis* citizenship has played in the law of citizenship since the early days of the republic. *Miller*, 523 U.S. at 477 (Breyer, J., dissenting). Abrogation would traverse Congress's clear, longstanding intent to extend that benefit to citizens. Further, it would ignore the evidence in the federal child support laws that Congress is now prepared to recognize legal ties between children and non-marital fathers based on paternity establishment, rather than requiring additional affirmative acts by fathers.

By the Government's own lights, extension of § 1409(a) to mothers would have a greater disruptive effect on the

statutory scheme than severance. Despite its assertions that the requirements of (a)(3) and (a)(4) are minimal, the Government admits that imposing (a)(3) and (a)(4) on citizen mothers would heighten risks of statelessness that § 1409(c) sought to counter. Resp't Br. 49 n.25. Petitioners agree that expanding § 1409(a) to mothers is not the appropriate remedy here, in particular because it would (1) run counter to the INA's severability clause; (2) deny expected benefits to mothers; and (3) require greater judicial reworking of the existing statutory framework. The Government's assertion that severance of (a)(3) and (a)(4) would be equally disruptive, however, is misguided.

The Government initially claims that severance would undermine the statutory scheme by equating non-marital fathers with marital fathers. First, the fact that § 1409(c) currently provides more generous terms for non-marital mothers than marital parents of both sexes indicates that the purported goal of favoring marital spouses was not as overriding as the Government now contends. Second, as noted above, a decision striking §§ 1409(a)(3) and (a)(4) will not bar distinctions based on marital status; the means to make such distinctions are readily available to Congress should it wish to pursue that goal. Finally, § 1409(a)(1) requires that proof of the relationship between the non-marital child and father be established by "clear and convincing evidence." Section 1401(g) sets out no such specific standard for proof of parentage. Consistent with this statutory language and in accordance with this Court's decision in *Rivera v. Minich*, 483 U.S. 574, 575 (1987), marital fathers could be held only to the "preponderance of the evidence" standard in proving parentage for purposes of § 1401(g).

Respondents further argue that "striking 'burdens' imposed by § 1409(a) would confer citizenship . . . on thousands of foreign-born children who have no connection to this country other than a blood relationship to a citizen

father they have never known or even seen." Resp't Br. 48. This dramatic statement does not stand up to analysis. As set out in detail in Petitioners' opening brief, upon severance of (a)(3) and (a)(4), the requirements of physical presence, nationality, and proof of paternity by clear and convincing evidence will remain. Pet. Br. 35. For most "foreign-born children who have no connection to this country," proof of paternity will prove an insurmountable barrier. *See, e.g.*, Anne Keegan, *Children of Vietnam Find Few Fathers at U.S. Doors*, Chi. Trib., May 13, 1987; *United States v. Ahumada-Aguilar*, 189 F.3d 1121, 1122-1123 (9th Cir. 1999) (noting that mother and son searched for out-of-wedlock father for over 20 years). Likewise, proof of physical presence through school and employment records will be difficult to obtain for someone who has had no contact with this country and "never known or even seen" their father. Resp't Br. 48. Far more typical will be a case similar to the one at bar, where the citizen father and his child have maintained contact and the father assists in assembling the requisite proof.

But even if, as the Government intimates, not all of the children of citizen fathers admitted under a revised § 1409 are "assets" to the country, there is no assurance that non-marital children of citizen mothers are any more desirable. Yet the current version of the law assumes that sex-based dichotomy. As a result, fathers like Joseph Boulais who have a close connection with their children are assumed to be less worthy. As in *Caban v. Mohammed*, "[t]he facts of this case illustrate the harshness of classifying unwed fathers as being invariably less qualified and entitled than mothers." 441 U.S. at 394.

The measure of an equal protection violation is not the numbers of people affected, but the individual who experiences discrimination at the hands of the state. *See J.E.B.*, 511 U.S. at 152 (Kennedy, J., concurring) ("The Equal Protection Clause and our constitutional tradition are based

on the theory that an individual possesses rights that are protected against lawless action by the government."); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting) ("At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens 'as *individuals*, not as simply components of a racial . . . [or] sexual . . . class.'") (citations omitted). Petitioners Joseph Boulais and his son demonstrate the individual impact of these sex-based classifications on fathers and their families – an impact that no mother will ever experience under the existing law. That Boulais may be in the minority of fathers who care for their children from infancy is beside the point. This Court has never required that remedies for equal protection violations must address the needs of the majority. *See, e.g., Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (admitting male nursing student to all-female school). To the contrary, the equal protection clause is intended to protect individuals like the father and son here.

CONCLUSION

For the foregoing reasons and those in the Brief of Petitioner, the Court should declare 8 U.S.C. §§ 1409(a)(3) and (a)(4) unconstitutional and reverse the judgment below.

Respectfully submitted,

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In The

Supreme Court of the United States

TUAN ANH NGUYEN AND
JOSEPH ALFRED BOULAIS,

Petitioners,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTION PRESENTED

Whether the distinction in 8 U.S.C. § 1409 between out-of-wedlock children of United States citizen mothers and out-of-wedlock children of United States citizen fathers is a violation of the Fifth Amendment to the United States Constitution?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

A. Factual Background 4

B. Statutory Framework and Proceedings Below 5

SUMMARY OF ARGUMENT 9

ARGUMENT 12

I. SECTION 1409 UNCONSTITUTIONALLY DISCRIMINATES ON THE BASIS OF SEX 12

A. A Majority Of This Court's Members Have Recognized That Section 1409 Reflects Impermissible Sex-Based Stereotypes and Must Fail Under Heightened Scrutiny 12

B. The Government Has Failed To Demonstrate An Exceedingly Persuasive Justification For The Sex-Based Classifications in Section 1409 16

1. The Sex-Based Classifications In Section 1409 Are Not Substantially Related To The Purported Government Interest Of Fostering Close Ties Between The Child, The Parent And The United States 16

2. The Sex-based Classifications In Sections 1409(a)(3) And (a)(4) Are Not Substantially Related To The Purported Government Interest Of Ensuring A Blood Tie Between The Parent And The Child And Reducing False Claims of Citizenship 21

II. SEX-BASED DISCRIMINATION IN STATUTORY CITIZENSHIP AT BIRTH IS SUBJECT TO HEIGHTENED SCRUTINY 24

A. Statutory Citizenship At Birth Is Distinct From Immigration and Naturalization 24

B. Whatever Plenary Power Congress May Possess Over Immigration Does Not Bar Heightened Scrutiny of Section 1409(a) 26

1. This Court Has Never Extended Plenary Power to Citizenship At Birth.....26

2. Congress's Plenary Powers Have Not Barred Heightened Scrutiny of Constitutional Violations In Areas..... 30

III. AS IN OTHER EQUAL PROTECTION CHALLENGES TO FEDERAL AND STATE STATUTES THIS COURT CAN PROPERLY GRANT RELIEF BY SEVERING THE OFFENDING PROVISION..... 32

A. Congress Would Have Favored Severing The Offending Provision Had It Known of Its Unconstitutionality..... 32

B. This Court's Exercise Of Its Remedial Authority To Strike The Discriminatory Provisions Of Section 1409(a) Does Not Constitute An Illicit Grant of Citizenship..... 36

CONCLUSION.....40

TABLE OF AUTHORITIES

FEDERAL CASES

Ablang v. Reno,
52 F.3d 801 (9th Cir. 1995)..... 22

Alaska Airlines, Inc. v. Brock,
480 U.S. 678 (1987)..... 33

Breyer v. Meissner,
214 F.3d 416 (3d Cir. 2000)..... 27

Caban v. Mohammed,
441 U.S. 380 (1979)..... 17, 18

Califano v. Goldfarb,
430 U.S. 199 (1977)..... 30

Califano v. Webster,
430 U.S. 313 (1977)..... 30

Califano v. Westcott,
443 U.S. 76 (1979)..... 18, 30, 34

Fiallo v. Bell,
430 U.S. 787 (1977)..... 8, 28, 29

Frontiero v. Richardson,
411 U.S. 677 (1973)..... 34

INS v. Chadha,
462 U.S. 919 (1982)..... 32, 33, 34

INS v. Pangilinan,
486 U.S. 875 (1988) 37, 38

J.E.B. v. Alabama ex rel. T.B.,
511 U.S. 127 ..... 14, 19

Kennedy v. Mendoza-Martinez,
372 U.S. 144 (1963) 25

Kleindienst v. Mandel,
408 U.S. 753 (1972) 29

Knauer v. United States,
328 U.S. 654 (1946) 25

Lake v. Reno,
226 F.3d 141 (2d Cir. 2000) 27, 38

Lawrence v. State Tax Commission of Miss.,
286 U.S. 276 (1932) 31

Lehr v. Robertson,
463 U.S. 248 (1983) 36

Mathews v. Diaz,
426 U.S. 67 (1976) 28, 29

Miller v. Albright,
523 U.S. 420 (1998) ..... *passim*

Mississippi University for Women, v. Hogan,
458 U.S. 718 (1982) 12, 14, 19

Moritz v. Commissioner,
469 F.2d 466 (10th Cir. 1972), *cert. denied*, 412
U.S. 906 (1973) 32

New York v. United States,
505 U.S. 144 (1992) 32

Nguyen v. INS
208 F.3d 528 (5th Cir. 2000) 1, 8, 9, 16, 28

Parham v. Hughes,
441 U.S. 347 (1979) 36

Pickett v. Brown,
462 U.S. 1 (1983) 23

Rainey v. Chever,
527 U.S. 1044 (1999), *denying cert. to* 510 S.E.
2d 823 (Ga. 1999) 36

Regan v. Taxation With Representation of Wash.,
461 U.S. 540 (1983) 31

Reno v. ACLU,
521 U.S. 844 (1997) 34

Rogers v. Bellei,
401 U.S. 815 (1971) 27, 28, 30, 36

Rostker v. Goldberg,
453 U.S. 57 (1981) 31

Schneider v. Rusk,
377 U.S. 163 (1964) 25

United States v. Ahumada-Aguilar,
189 F.3d 1121 (9th Cir. 1999) 33

United States v. Virginia,
518 U.S. 515 (1996) 10, 12, 19, 24

Wauchope v. U.S. Department of State,
985 F.2d 1407 (9th Cir. 1993) 27, 37

Weinberger v. Wiesenfeld,
420 U.S. 636 (1975) 17, 30

CONSTITUTIONAL PROVISIONS

U.S. Const. art. II, § 1, cl. 5 25

U.S. Const. amend. V 2

FEDERAL STATUTES

8 U.S.C. § 1101(a)(23) 25

8 U.S.C. § 1105a(5) (1994) 7

8 U.S.C. §§ 1251(a)(2)(A)(ii) and (iii) 6

8 U.S.C. § 1401(g) 5, 20, 21, 33

8 U.S.C. § 1409 ..... *passim*

10 U.S.C. § 1447(11)(A)(iii) 21

28 U.S.C. § 1254(1) 2

50 U.S.C. § 2002(b)(1)(A)(iii) 21

Act of May 24, 1934, § 1, 48 Stat. 797 21

Child Support Enforcement Amendments of 1984,
Pub. L. No. 98-378, § 466 (a) (5), 98 Stat. 1305,
1307 (1985) 23

Illegal Immigration Reform and Immigration
Responsibility Act ("IIRIRA"), Pub. L. 104-208,
110 Stat. 3009, § 309(c)(I)(4) 7

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414, § 406, 66 Stat. 163, 281 (1952) 3, 33

SCHOLARLY AUTHORITY

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Condemns": Constitutional Sex Discrimination
Law as a Quest for Perfect Proxies*, 85 Cornell L.
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Scientific and Legal Validity of Conventional
Blood Testing and DNA Fingerprinting to
Establish Proof of Parentage in Immigration
Cases*, 1994 B.Y.U. L. Rev.129 (1994) 23

In The Supreme Court of the United States

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF PETITIONERS

OPINIONS BELOW

The opinions below were submitted to this Court in the Appendix of the Petition for the writ of *certiorari* (Pet. App.). The opinion of the Court of Appeals is reported at 208 F.3d 528 (5th Cir. 2000). Pet. App. 1a-13a. The opinion of the Board of Immigration Appeals on reconsideration is unreported and is reproduced at Pet. App. 14a-16a. The initial opinion of the Board of Immigration Appeals is unreported and is reproduced at Pet. App. 17a-21a. The deportation order of the Immigration Judge is unreported and is reproduced at Pet. App. 20a-21a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on April 17, 2000. The Court granted the petition for a writ of *certiorari* on September 26, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law.

2. Section 309 of the Immigration and Nationality Act (INA), ch. 477, 66 Stat. 238 (1952), as amended, 8 U.S.C. § 1409, provides in pertinent part:

> Children born out of wedlock.
>
> (a) The provisions of paragraphs (c), (d), (e), and (g) of section 301 (8 U.S.C. § 1401), and of paragraph (2) of section 308 (8 U.S.C. § 1408), shall apply as of the date of birth to a person born out of wedlock if –
>
> (1) a blood relationship between the person and the father is established by clear and convincing evidence,
>
> (2) the father had the nationality of the United States at the time of the person's birth,
>
> (3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and

> (4) while the person is under the age of 18 years–
>
> (A) the person is legitimated under the law of the person's residence or domicile,
>
> (B) the father acknowledges paternity of the person in writing under oath, or
>
> (C) the paternity of the person is established by adjudication of a competent court.
>
> * * * * *
>
> (c) Notwithstanding the provision of subsection (a) of this section, a person born . . .outside of the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year.

3. Section 309(a) of the Immigration and Nationality Act (INA), ch. 477, 66 Stat. 238 (1952), provides in pertinent part:

> The provisions of paragraphs . . . (7) of section 301(a). . . shall apply as of the date of birth to a child born out of wedlock on or after the effective date of this Act, if the paternity of such child is established while such child is under the age of twenty-one years by legitimation. * * *

4. Section 406 of the Immigration and Nationality Act (INA), ch. 477, 66 Stat. 238 (1952), note following 8 U.S.C. § 1101 provides:

> If any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the

remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

STATEMENT OF THE CASE

A. Factual Background

Joseph Boulais, an American citizen by birth, was born in Hartford, Connecticut on June 21, 1937. Joint Appendix at 6 [hereinafter J.A.]. He lived in the United States continuously through his early adulthood, attending public schools in Hartford. Appellate Record at 84-86 [hereinafter R.]. In 1960, at age 23, Boulais enlisted in the United States Army. J.A. 10. He served in Germany, receiving an honorable discharge in January 1963. J.A. 9.

Following his discharge from the army, Boulais relocated to Vietnam. In 1969, while he was working for Pacific Architect Engineer, a military contractor, he began a relationship with a Vietnamese citizen, Hung Thi Nguyen. J.A. 20; R. at 45. As a result of that relationship, Joseph Boulais's son, Tuan Anh Nguyen ("Nguyen"), was born in Vietnam on September 11, 1969. J.A. 20; R. at 44.

Soon after his son's birth, Boulais's relationship with Hung Thi Nguyen soured. J.A. 20. Thus, from early infancy, Tuan Anh Nguyen lived with his father, who later married another Vietnamese national.

In 1975, Saigon fell to North Vietnamese troops. Six year-old Nguyen escaped from Vietnam with the family of Boulais's wife. J.A. 20. Within a few months, Nguyen was paroled into the United States as a refugee, and was reunited with Boulais. R. at 149. In the chaos surrounding the fall of

Saigon and his family's separation, Boulais lost contact with Nguyen's biological mother. J.A. 21. She never again communicated with Boulais, and he does not know whether she survived the war. J.A. 21.

Since 1975, Boulais, his wife and Nguyen have lived as a family in the United States. Nguyen adjusted his status to that of lawful permanent resident in 1975 pursuant to the Indochinese Refugee Act. R. 149. He never returned to Vietnam. While Boulais provided financial support to Nguyen throughout his minority, he did not legitimate or otherwise formally establish his paternity prior to Nguyen's 18th birthday. In 1997, Boulais underwent a DNA test confirming that Nguyen is indeed his son. J.A. 15.

B. Statutory Framework and Proceedings Below

Section 1401(g) of the Immigration and Nationality Act provides that a child who is born abroad of one alien parent and one United States citizen parent is generally deemed to be a citizen of the United States at birth if, prior to the birth, the parent was physically present in the United States for not less than five years, at least two of which were after the parent turned fourteen. 8 U.S.C. § 1401(g). If, however, such a child is born out of wedlock and the citizen parent is the father, Section 1409(a) imposes additional conditions, including: that a blood relationship between the child and the father be established by clear and convincing evidence; that the father agree in writing to provide financial support for the child until he or she turns eighteen; and that, while the child is under the age of eighteen, the father legitimate the child or acknowledge paternity in writing under oath, or that paternity be established by adjudication. 8 U.S.C. §§

1409(a)(1), (3), (4).[1] A child born out of wedlock to a United States citizen mother is not subject to Section 1409(a), but instead acquires citizenship at birth provided the mother had United States nationality at the time of the birth and had previously been physically present in the United States for a continuous period of one year. 8 U.S.C. § 1409(c).

In 1992, Nguyen pled guilty in Texas state court to two felony charges. He was sentenced to eight years in prison for each crime, to be served concurrently. While Nguyen was serving his term, the Immigration and Naturalization Service ("INS") began deportation proceedings against Nguyen, charging that he was subject to deportation as an alien who had been convicted of two crimes involving moral turpitude and an aggravated felony under 8 U.S.C. §§ 1251(a)(2)(A)(ii) and (iii). On January 30, 1997, Nguyen was ordered deported to Vietnam by the immigration judge. Pet. App. 20a. Nguyen timely appealed the immigration judge's order to the Board of Immigration Appeals ("BIA"). In his appeal, Nguyen argued that he was a United States citizen under 8 U.S.C. § 1409 and accordingly not subject to deportation.

[1] Before 1986, the pertinent portions of Section 1409(a) required only that paternity be "established by legitimation" before the child's 21st birthday. By virtue of his birth date, Nguyen belongs to a class of children who may elect whether to have the "old" or "new" Section 1409 govern their cases. *See* note following 8 U.S.C. § 1409 (effective date of 1986 Amendment) (quoting § 23(e), Pub. L. 100-525, § 8(r), 102 Stat. 2619). Because Nguyen has not made such an election, and because he does not meet the requirements of either the pre-1986 law or the current Sections 1409(a)(3) and (4), he challenges both versions of the statute.

While the appeal was pending, Boulais instituted a paternity proceeding in a Texas district court. In February 1998, based on DNA testing results indicating to a certainty of 99.98 percent that Boulais is Nguyen's father, Boulais obtained an "Order of Parentage" from the Texas court. This evidence of paternity, along with the claim of Nguyen's United States citizenship, was submitted to the BIA, but apparently was not initially considered by the Board. Pet. App. 15a. On June 2, 1998, the BIA dismissed Nguyen's appeal. A motion for reconsideration based on the evidence of Boulais's paternity was denied by the BIA on May 28, 1999, based on this Court's decision in *Miller v. Albright*, 523 U.S. 420 (1998). Pet. App. 14a. According to the BIA, *Miller* stood for the proposition that "different proof requirements for the father, as opposed to the mother, did not represent an unconstitutional denial of equal protection." Pet. App. 16a.

On June 30, 1998, Boulais and Nguyen timely filed a petition for review of the BIA ruling with the United States Court of Appeals for the Fifth Circuit pursuant to 8 U.S.C. § 1105a(5) (1994), which confers jurisdiction on the courts of appeal to hear appeals of deportation orders based on nonfrivolous claims to United States citizenship.[2] On July 2, 1998, Nguyen and Boulais also jointly filed an action in the District Court for the Southern District of Texas seeking review of the BIA ruling and requesting a declaration that

[2] The petition for review was governed by former 8 U.S.C. § 1105a, as amended by "transitional" judicial review rules which apply to deportation proceedings initiated before April 1, 1997. *See* Illegal Immigration Reform and Immigration Responsibility Act ("IIRIRA"), Pub. L. 104-208, 110 Stat. 3009, § 309(c)(I)(4).

Nguyen has been a United States citizen since birth.[3] Pet. App. 3a-4a.

On April 17, 2000, the Fifth Circuit ruled on the petition for review. The court first ascertained that it had jurisdiction to determine the citizenship claim. *Nguyen v. INS*, 208 F.3d 528, 531-532 (5th Cir. 2000); Pet. App.5a. According to the court, because a Texas court had entered an "Order of Parentage" establishing that Boulais is Nguyen's biological father, no issue of material fact existed and there was therefore no need to remand the case to the district court for any factual determination. *Id.* at 532; Pet. App. 6a. Reviewing the opinions of this Court in *Miller v. Albright*, 523 U.S. 420 (1998), the court then concluded that Boulais was a proper party to the proceedings, who had "made every effort to represent his own interests in the present suit," and who had standing to challenge the constitutionality of 8 U.S.C. §§ 1409(a)(3) and (4). *Nguyen*, 208 F.3d at 534; Pet. App. 9a-10a.

Turning to the equal protection argument, the court rejected the application of the deferential "facially legitimate and bona fide reason" standard applied in *Fiallo v. Bell*, 430 U.S. 787 (1977), to Petitioners' claim of citizenship at birth. As the court of appeals noted, "there are significant differences between INA § 1409 which is challenged in the present case, and the INA statute challenged in *Fiallo*. Specifically, the statute in *Fiallo* dealt with the claims of aliens for special immigration preferences, whereas the petitioner's claim in this case is that he is a citizen." *Id.* at 534-535; Pet. App. 11a.

[3] That case, captioned *Nguyen v. Reno*, Civ. No. H-98-2086 (S.D. Tex., complaint filed July 2, 1998), is being held in abeyance by the District Court pending the outcome of this matter.

The court then examined whether the requirements of Section 1409(a)(3) and (4) can survive heightened constitutional scrutiny. On this point, the court of appeals followed the plurality opinion in *Miller*, upholding Section 1409 as "well tailored" to meet "several important government objectives." *Nguyen*, 208 F.3d at 535; Pet. App. 12a. The court concluded that because Boulais did not meet the requirements of Section 1409 to establish citizenship at birth, Nguyen was an alien convicted of an aggravated felony. The court accordingly granted the Government's motion to dismiss the petition for review. *Id.* at 536; Pet. App. 13a.

SUMMARY OF ARGUMENT

Title 8 U.S.C. § 1409, which governs the transmission of citizenship at birth to non-marital children born to United States citizens abroad, is one of the few remaining federal laws that treats individuals differently based solely on their sex. Specifically, a female citizen can transmit citizenship upon proof of three elements: United States nationality at the time of the child's birth, maternity, and physical presence in the United States prior to the birth. 8 U.S.C. § 1409(c). By contrast, a male citizen must prove not only U.S. nationality, paternity, and physical presence, but must also, prior to the child's eighteenth birthday, (a) agree in writing to provide financial support to the child, 8 U.S.C. § 1409(a)(3); and (b) legitimate the child, acknowledge paternity in writing under oath or establish paternity through a court. 8 U.S.C. § 1409(a)(4). Under this regime, a father like Joseph Boulais who has supported his son from infancy may be forever barred from transmitting citizenship after his child's eighteenth birthday, whereas a citizen mother who left her child at birth and provided no emotional or financial support whatsoever could nevertheless transmit citizenship at birth.

In *Miller v. Albright*, 523 U.S. 420 (1998), a majority of this Court's members indicated that Section 1409 would not withstand scrutiny under the Equal Protection Clause. In particular, five Justices observed that the law reflects gender-based stereotypes that have been previously condemned by this Court. These stereotypes include the generalization that mothers are typically caregivers, and thus no additional proof of their relationship to their child is needed. At the same time, the special requirements imposed on fathers, including the time limit for legitimating or acknowledging the child, reflect the stereotype that fathers will not typically have such connections to their children. By giving these stereotypes the force of law, Section 1409 operates to deny rights to fathers like Joseph Boulais who do not conform to expected sex-based social roles.

In defending an official classification based on gender, the Government must shoulder the demanding burden of demonstrating an "exceedingly persuasive justification" for the classification. *United States v. Virginia*, 518 U.S. 515, 533 (1996) (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)). Here, the asserted governmental interests include ensuring ties between the child, the parent, and the United States and protecting against fraudulent claims. Even assuming that Congress intended to protect these governmental interests – an assertion that the construction of the statute itself calls into question – each of these interests can easily be met through gender neutral criteria. Indeed, the existing requirements of proving parentage, nationality, and physical presence in the United States prior to the child's birth are deemed sufficient to establish such connections when the citizen parent is a mother, and could be relied on to serve the same purpose for fathers. As to the Fifth Circuit's determination that special

requirements on fathers are necessary to deter fraudulent claims, the statute's requirement that proof of paternity be "clear and convincing" coupled with the existence of genetic testing provide a complete answer. There can be no fraud when such testing is available to establish paternity to 99.98 percent accuracy. Accordingly, because no persuasive justification supports its reliance on sex-based classifications, Section 1409 violates the equal protection guarantee of the Fifth Amendment of the United States Constitution.

Plenary constitutional review is entirely appropriate here. The statute at issue is solely concerned with citizen parents' transmission of citizenship at birth to their children. Accordingly, as seven Justices suggested in *Miller*, Congress's policy choices reflected in Section 1409 are not entitled to any special deference. Indeed, this Court has never failed to conduct a full constitutional review of a citizenship at birth statute directly affecting the rights of citizens to transmit *jus sanguinis* citizenship.

Finally, the proper remedy for this violation of the Constitution is to sever the provisions of the law – Sections 1409(a)(3) and (4) – that impermissibly impose additional burdens solely on fathers. Congress has specifically indicated that this is its desired result by including a severance clause in the Immigration and Nationality Act. Severing the provisions challenged here that unconstitutionally bar fathers' transmittal of citizenship will both cure the statute's sex-based inequality and effectuate Congress's purpose by allowing the remainder of the statute to continue in operation. Following this excision, the statute itself – and not this Court – will grant citizenship at birth on a non-discriminatory basis.

ARGUMENT

I. SECTION 1409 UNCONSTITUTIONALLY DISCRIMINATES ON THE BASIS OF SEX

A. A Majority Of This Court's Members Have Recognized That Section 1409 Reflects Impermissible Sex-Based Stereotypes And Must Fail Under Heightened Scrutiny

This Court requires that heightened scrutiny be used in reviewing an "official classification based on gender." *United States v. Virginia,* 518 U.S. 515, 532 (1996) [hereinafter *VMI*]. Focus must be on the differential treatment from which relief is sought, and the Government "must carry the burden of showing an 'exceedingly persuasive justification' for the classification." *Mississippi Univ. for Women, v. Hogan,* 458 U.S. 718, 724 (1982); *see also VMI*, 518 U.S. at 533 (1996). This burden is "demanding" and rests entirely on the Government, which must demonstrate that the challenged classification is "substantially related" to the achievement of "important governmental objectives." *VMI*, 518 U.S. at 533 (quoting *Mississippi Univ. for Women*, 458 U.S. at 724). The Government's justification must be genuine; it cannot be "invented *post hoc* in response to litigation." *Id.* Further, the Government cannot rely on "overbroad generalizations about the different talents, capacities, or preferences of males and females." *Id.* (citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643, 648 (1975); *Califano v. Goldfarb*, 430 U.S. 199, 223-224 (1977) (Stevens, J., concurring in judgment)). Physical differences between men and women may be "enduring," but they cannot be a basis for "denigration of the members of either sex or for artificial constraints on an individual's opportunity." *Id.*

Applying this standard in *Miller v. Albright*, 523 U.S. 420 (1998), a majority of this Court's members indicated that Section 1409 would not withstand heightened scrutiny under the Equal Protection Clause. *Miller*, 523 U.S. at 451-52 (O'Connor, J., concurring in judgment); 523 U.S. at 476 (Breyer, J., dissenting). In addition, a majority of the *Miller* Court condemned the sex-based stereotypes on which Section 1409 rests. *Miller*, 523 U.S. at 451-52 (O'Connor, J., concurring in judgment); *id.* at 482-83 (Breyer, J., dissenting).[4]

Indeed, the sex-based stereotypes boldly repeated by the Government in defending Section 1409(a) are reminiscent of an earlier time. These "familiar generalizations . . . [are that] mothers, as a rule, are responsible for a child born out of wedlock; fathers, unmarried to the child's mother, ordinarily, are not." *Miller*, 523 U.S. at 460 (Ginsburg, J., dissenting). Because the statute does not require a mother to take any special steps after the child's birth in order to transmit citizenship, it "depend[s] for [its] validity upon the generalization that mothers are significantly more likely than fathers to care for their children, or to develop caring relationships with their children." *Miller*, 523 U.S. at 482-83 (Breyer, J., dissenting). By the same token, the statute

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[4] Citizenship laws have long reflected gender stereotypes. *See Miller*, 523 U.S. at 461-69 (Ginsburg, J., dissenting) (describing how U.S. citizenship laws historically discriminated against women). For example, the Supreme Court of Canada recently reviewed the Canadian statute governing the citizenship of the children of Canadian citizens born abroad, striking it down as a violation of the Canadian Charter of Rights and Freedoms. *See Benner v. Canada (Secretary of State),* [1997] 1 S.C.R. 358, 365. The Canadian statute imposed additional hurdles on married citizen mothers seeking Canadian citizenship, beyond the requirements imposed on children of married citizen fathers.

perpetuates the notion that fathers have less responsibility than do mothers for non-marital children. *See* Cornelia T.L. Pillard and T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in Miller v. Albright*, 1998 Sup. Ct. Rev. 1, 22 (observing that Section 1409 reinforces men's "sexual irresponsibility" by giving "U.S. men, but not U.S. women, a choice to disavow the children they conceive with foreign partners").

As Justice O'Connor observed in *Miller v. Albright*, "[i]t is unlikely . . . that any gender classifications based on stereotypes can survive heightened scrutiny." *Miller*, 523 U.S. at 452 (O'Connor, J., concurring in judgment). *See also J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 152 (Kennedy, J., concurring in judgment) (noting that prevailing case law "reveal[s] a strong presumption that gender classifications are invalid"). Such generalizations have been repeatedly condemned by this Court because they deny rights to individuals who do not conform to socially defined gender roles. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982).

The facts here demonstrate the consequences for individuals when gender stereotypes define their statutory rights. Nguyen's mother disappeared in war torn Vietnam soon after his birth.[5] Defying the stereotype, and accepting full responsibility for his child, Boulais cared for his son first

[5] Many Vietnamese mothers were forced to abandon their Amerasian children under similar circumstances. *See* Ranjana Natarajan, *Amerasians and Gender-Based Equal Protection Under U.S. Citizenship Law*, 30 Colum. Human Rights L. Rev. 123, 124 (1998) (noting that Amerasian children are sometimes abandoned by mothers who cannot afford to care for them).

in Vietnam and later in the United States.[6] Boulais was a responsible father who provided support to his son throughout his minority. He failed, however, to take the necessary formal steps required by Sections 1409(a)(3) and (4) before Nguyen's eighteenth birthday. *See* Pillard & Alienikoff, *supra*, at 22 n.86 (discussing reasons that motivated father might fail to meet statute's age deadline such as lack of awareness, or failure to realize need or benefit of citizenship until child is ready to work). Accordingly, Boulais cannot now transmit citizenship to his son. In contrast, if an American mother had given birth to an out-of-wedlock child abroad and did everything that Boulais did not – left the child, provided no financial or emotional support, and had no subsequent contact with the child – she could still transmit citizenship at birth to her child. This case clearly underscores the danger, recognized by a majority of this Court in *Miller*, of permitting sex-based stereotypes to define legal rights.

[6] Boulais may be in the minority, but he is not alone. According to 1998 Census data, in the United States more than 700,000 never-married fathers are raising more than a million children. *See* Lynne M. Casper & Ken Bryson, U.S. Census Bureau, Household and Family Characteristics 108 (1998); Terry A. Lugaila, U.S. Census Bureau, Marital Status and Living Arrangements iii (1998).

B. The Government Has Failed To Demonstrate An Exceedingly Persuasive Justification For The Sex-Based Classifications In Section 1409

The Fifth Circuit held that Section 1409 was "well tailored" to meet two governmental objectives: first, encouraging ties during a child's formative years between the non-marital child, the parent, and the United States, and second, ensuring reliable proof of a biological relationship between the citizen parent and child. *See Nguyen v. INS*, 208 F.3d 528, 535; Pet. App. 12a-13a. Neither of these asserted objectives passes muster under this Court's stringent test for sex-based classifications.

1. The Sex-Based Classifications In Section 1409 Are Not Substantially Related To The Purported Government Interest Of Fostering Close Ties Between The Child, The Parent And The United States

While the Government may have an interest in fostering close and early ties between the non-marital child, the citizen parent and the United States, sex-based classifications are not necessary to further that interest. Indeed, the special restrictions placed on a father's transmittal of citizenship at birth may stand in the way of maintaining those ties. Moreover, the fact that mothers are not subject to any time limits or support requirements that might promote such early ties undermines the assertion that this interest is "important" and cannot be achieved by some gender-neutral means.

As a matter of biology, a mother may be presumed to know of a child's existence at the time of birth. But knowledge that one is a parent, no matter how it is acquired, does not guarantee a relationship with one's child. Just as

both men and women may abandon their children, both men and women may take responsibility for and raise their non-marital children. This undeniable reality is illustrated by the facts in this case where the father alone provided care and support. Yet the special requirements of Sections 1409(a)(3) and (4) rest on the assumption that men and women represent different extremes without overlap with respect to care and support of their children. By imposing additional requirements on fathers alone to demonstrate an ongoing relationship with their child, the statute effectively assumes that women will invariably establish such a relationship and that men will not.

This scheme "rests upon a host of unproved gender-related hypotheses," *Miller*, 523 U.S. at 485 (Breyer, J., dissenting), which this Court has rejected in other contexts. In fact, under heightened scrutiny this Court has repeatedly struck down statutory distinctions based on assumptions that women, not men, are caregivers, and men, not women, bear the burden of providing financial support.

In *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1982), this Court recognized that a social security statute that provided mothers, but not fathers with survivors benefits when the other parent died was based on stereotypes that mothers, but not fathers, would stay home with their children. The Court concluded, "[i]t is no less important for a child to be cared for by its sole surviving parent when that parent is male rather than female." *Weinberger*, 420 U.S. at 652.

In *Caban v. Mohammed*, 441 U.S. 380 (1979), this Court refused to accept gender as a proxy for an individual's ability or inclination to make decisions about his child's life when it struck down a New York adoption statute that permitted mothers, but not fathers, to unilaterally block the adoption of

their non-marital children. Like this case, *Caban* involved an unwed father who had a close relationship with his non-marital children. The Court observed that the case "illustrate[d] the harshness of classifying unwed fathers as being invariably less qualified and entitled than mothers to exercise a concerned judgment as to the fate of their children." *Caban*, 441 U.S. at 394. The Court further criticized the statutory scheme which, like the one at issue here, excluded "some loving fathers" from making decisions about their children while enabling "some alienated mothers" to continue to do so. *Id.*

Similarly, in *Califano v. Westcott*, 443 U.S. 76 (1979), this Court invalidated a federal statute that provided welfare benefits to families when a breadwinner father was unemployed, but denied benefits to families when a breadwinner mother was unemployed. According to the Court, such a rule was "not substantially related to the attainment of any important and valid statutory goals" but was "rather, part of the 'baggage of sexual stereotypes'" that presumed that fathers provided financial support to the family while mothers stayed home to raise children. *Westcott*, 443 U.S. at 89.

The additional requirements in Section 1409(a) that only a father must legitimate or acknowledge paternity of his non-marital child and undertake to provide for the child's support limit rights based on the gender-based caregiver/breadwinner dichotomy in a way that this Court has repeatedly disapproved. Like Stephen Wiesenfeld, the respondent in *Weinberger v. Wiesenfeld*, Joseph Boulais cared for his son as a parent yet is now treated as a stranger because he is male. Ironically, though Boulais supported his child, because he undertook that obligation freely as a parent and without any formal written promise, he fails to meet the

requirements of Section 1409(a)(3). A citizen mother is not formally required to provide such support; if Nguyen's mother had been the U.S. citizen instead of his father, then Nguyen would be a citizen, even though his mother took no part in his upbringing. The reason for the distinction lies in stereotype: the stereotype that a connection is automatically established between mothers and their children but not fathers and their children, and the stereotype that men, not women, are sole providers for their families. *See Miller*, 523 U.S. 488 (Breyer, J., dissenting) (noting that because "either men or women may be 'breadwinners,' one could justify [Section 1409's] gender distinction only on the ground that more women are caretakers than men, and more men are 'breadwinners' than women. This, again, is the kind of generalization that we have rejected as justifying a gender-based distinction in other cases").

As this Court has repeatedly recognized, the fact that such sex-based generalizations and stereotypes may contain a measure of truth or may be statistically defensible, does not justify the Government's reliance on those generalizations. *See J.E.B. v. T.B.*, 511 U.S. 127, 139 n.11 (noting that "gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization."). The Equal Protection Clause nevertheless prohibits using sex as a proxy for other characteristics unless it is supported by an "exceedingly persuasive" justification. *VMI*, 518 U.S. at 515, 537; *Mississippi Univ. for Women*, 458 U.S. at 718, 724. Here, the Government's justifications fall short of this high standard.

First, the relationship between Section 1409 and the purported governmental interest in fostering close ties between non-marital children and their citizen parents, far

from being "substantially related," is quite attenuated. The fact that mothers are not required to comply with the same special requirements imposed on fathers suggests that in enacting Section 1409, Congress was not overly concerned about limiting transmittal of citizenship at birth only to children who have close ties to a citizen parent. As noted above, a citizen mother who has provided no emotional or financial support to her child whatsoever can nevertheless transmit citizenship to the child at any point during the child's life upon proof of the requisite physical presence, nationality, and maternity. *See* 8 U.S.C. § 1409(c). Indeed, even Section 1409(a) does not require any actual evidence of close ties during the child's minority, but relies on support and paternity establishment as rough proxies for such ties.

Second, to the extent that the Government has a real concern about encouraging close ties between the non-marital child, the parent, and the United States, sex-based classifications are not necessary to satisfy that interest. Indeed, such ties are already encouraged by the statutory provisions remaining after the unconstitutional provisions challenged here are severed. *See* discussion *infra* at Part III. A. (discussing severance). Both Sections 1401(g) and 1409(c) include physical presence requirements applicable to the parent prior to the child's birth. These requirements mandate parental ties to the United States that may be shared with the child. Similarly, Sections 1409(a)(1) and (2) and Section 1409(c) require proof of the parent's United States citizenship at the time of birth, and the blood relationship between the parent and the child. All of these proof requirements contribute to encouraging a significant connection between the citizen parent, the child, and the United States, whether the parent is a mother or a father. Significantly, Congress has found such gender-neutral approaches satisfactory in other relevant contexts. *See, e.g.*,

8 U.S.C. § 1401(g) (according citizenship at birth to foreign-born marital child of U.S. citizen and alien based on gender-neutral criteria); Act of May 24, 1934, § 1, 48 Stat. 797 (according citizenship to foreign-born non-marital child of citizen parent based on gender-neutral criteria) (in effect from 1934 to 1940). *See also* 10 U.S.C. § 1447(11)(A)(iii) (child eligible for armed services survivor benefits includes "recognized natural child who lived with [covered parent] in a regular parent-child relationship."); 50 U.S.C. § 2002(b)(1)(A)(iii) (child eligible for benefits under CIA retirement and disability plan includes "recognized natural child").

2. The Sex-Based Classifications In Sections 1409(a)(3) And (4) Are Not Substantially Related To The Purported Government Interest Of Ensuring A Blood Tie Between The Parent And The Child And Reducing False Claims Of Citizenship

While Congress may properly seek to ensure that an individual who claims citizenship is truly a citizen's child, the statute already includes provisions – not challenged here – that meet this objective as to both parents in a gender neutral manner. Section 1409(a)(1) requires that paternity be established by "clear and convincing evidence." 8 U.S.C. § 1409(a)(1). Likewise, Section 1409(c) requires proof of maternity, which the Government has previously acknowledged is judged by "clear and convincing evidence."[7] Brief for Respondent at 31-32, *Miller v.*

[7] While a mother will generally be aware of the birth, proving maternity of a particular child may require additional evidence. A birth certificate will typically suffice, but such documentation is not always available, particularly in developing countries or areas in political turmoil. *See, e.g., Ablang v. Reno*, 52 F.3d 801, 805 (9th Cir. 1995) (noting that

Albright, 523 U.S. 420 (1998) (No. 96-1060). Joseph Boulais met this requirement by taking a DNA blood test that confirmed Nguyen is his son. J.A. 15-19.

The statutory requirements challenged in this case – a written promise of support and legitimation or acknowledgement, both before age 18 – are additional to the requirement to submit clear and convincing evidence of paternity. However, given the accuracy of genetic tests, these requirements are unnecessary to the governmental objectives of ensuring a blood tie and discouraging fraud. *See Miller*, 523 U.S. at 487 (Breyer, J., dissenting) (distinguishing *Lehr v. Robertson*, 463 U.S. 248 (1983), in that it was "decided before the DNA advances" that make formal legitimation requirements unnecessary to prove paternity). Since the interests in accurately determining paternity and reducing false claims are squarely met by the gender neutral requirement of proving parentage by clear and convincing evidence, the Government's purported rationale for Section 1409(a)'s sex-based classifications is not an "exceedingly persuasive" justification.

Succinctly put, because genetic testing is widely available, accurate to more than 99 percent accuracy, and can be done at any time, time limits on establishing connections between fathers and their offspring are not necessary to reduce fraud.[8] As this Court squarely recognized even prior to enactment of Section 1409:

Ablang's birth certificate was eaten by white ants). Accordingly, under some circumstances a mother may also be required to submit to blood tests or other means of establishing her relationship to the child.

[8] The accuracy of current DNA testing has been widely accepted. *See, e.g.*, Comm. on DNA Tech. in Forensic Science, Nat'l Research Council, DNA Technology in Forensic Science (1992); David H. Kaye, *DNA*

> [A]dvances in blood testing render more attenuated the relationship between a statute of limitations and the State's interest in preventing the prosecution of stale or fraudulent paternity claims. This is an appropriate consideration in determining whether a period of limitations governing paternity actions brought on behalf of illegitimate children is substantially related to a legitimate state interest.

Pickett v. Brown, 462 U.S. 1, 17-18 (1983). *See also* H.R. Rep. No. 98-527, at 38 (1983) (noting in amending federal child support statute, that recent "advances in scientific paternity testing eliminate the rationale" for arbitrary limitations on paternity establishment).[9]

The governmental interest in ensuring that only true children of American fathers claim citizenship is thus amply satisfied by Section 1409(a)(1). Genetic testing allows that provision's "clear and convincing" standard to shoulder the burden of meeting the government's interest. Because reliable genetic testing – which can be done at any time –

Evidence: Probability, Population Genetics, and the Courts, 7 Harv. J. L. & Tech 101 (1993); Alan R. Davis, Comment, *Are You My Mother? The Scientific and Legal Validity of Conventional Blood Testing and DNA Fingerprinting to Establish Proof of Parentage in Immigration Cases*, 1994 B.Y.U. L. Rev. 129 (1994).

[9] The child support statute enacted by Congress specified the process by which paternity could be established only up to the child's 18th birthday because the parent's support obligation would cease after that date. There is no valid reason that a father's ability to transmit citizenship status should be similarly limited. *See* Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, § 466 (a) (5), 98 Stat. 1305, 1307 (1985).

levels the field between mothers and fathers in demonstrating that the children they claim are their actual children, it undermines any assertion that sex-based classifications are necessary to further that government interest.

In sum, the impermissible sex discrimination contained in Sections 1409(a)(3) and (4) is apparent on the face of the statute. There is no "exceedingly persuasive justification" to support this discriminatory scheme. The provision therefore cannot survive the test articulated by this Court in *VMI*.

II. SEX-BASED DISCRIMINATION IN STATUTORY CITIZENSHIP AT BIRTH IS SUBJECT TO HEIGHTENED SCRUTINY

The Government has further asserted that even if the statute is discriminatory, it is beyond the Court's power to provide a remedy. These arguments are without merit. Neither Congress's plenary power over immigration nor limitations on this Court's remedial authority bar Petitioners' claim to non-discriminatory access to citizenship at birth.

A. Statutory Citizenship At Birth Is Distinct From Immigration and Naturalization

This case concerns the right of American citizen Joseph Boulais to be free of discrimination in transmitting statutory "citizenship at birth" to his son Nguyen, establishing that his son rightfully is, and for years has been, an American citizen. *See, e.g., Miller v. Albright*, 523 U.S. at 432 (Stevens, J.) (noting that judgment in Miller's favor would "confirm her pre-existing citizenship rather than grant her rights that she does not now possess").

It is beyond dispute that citizenship is an important and unique right. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159 (1963) (the right of citizenship is "a most precious right"). Congress's provision of citizenship at birth to children born abroad to citizen parents is clearly distinct from the regulation of immigration, where Congress exercises its authority to exclude persons for whom it recognizes *no* present claim to citizenship, or even entry. *See Miller v. Albright*, 523 U.S. at 433 n.10 (Stevens, J.) (distinguishing *Johnson v. Eisentrager*, 339 U.S. 763 (1950) and *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), because complainants were not citizens or nationals of the United States).

Similarly, though naturalization rests on proven ties to the United States, it is legally distinct from statutory citizenship at birth. Once the conditions for statutory citizenship at birth are met, an existing status is recognized; in contrast, citizenship through naturalization accords a new status that begins only when naturalization is complete. *Compare* 8 U.S.C. § 1101(a)(23) ("The term 'naturalization' means the conferring of nationality of a state upon a person *after* birth, by any means whatsoever") (emphasis added) *with* 8 U.S.C. § 1409(a) (acknowledging citizenship "as of the date of birth").[10] Accordingly, recognition of citizenship

[10] In addition, naturalized citizens who secure citizenship after birth cannot serve as President or Vice President, since the United States Constitution requires that such an officer holder be a "natural born" citizen. U.S. Const. art. II, § 1, cl. 5. *See Schneider v. Rusk*, 377 U.S. 163, 165, 177 (1964); *Knauer v. United States*, 328 U.S. 654, 658 (1946) (citing *Luria v. United States*, 231 U.S. 922 (1913)). While there has been considerable debate on this subject, most commentators have concluded that statutory citizens at birth are eligible for these positions. *See* Charles Gordon, *Who Can Be President of the United States: The Unresolved Enigma*, 28 Md. L. Rev. 1 (1968); Jill A. Pryor, Note, *The Natural-Born Citizen Clause and Presidential Eligibility: An Approach*

at birth does "not involve the transfer of loyalties that underlies the naturalization of aliens." *Miller*, 523 U.S. at 478 (Breyer, J., dissenting). This is particularly true because under Section 1409, Congress has linked statutory citizenship at birth to clear and convincing proof of a blood relationship with an American citizen parent, ensuring that citizenship at birth coincides with and reinforces a significant familial connection. 8 U.S.C. § 1409(a)(1), (c); *see also* Brief for Respondent at 31-32, *Miller v. Albright*, 523 U.S. 420 (1998) (No. 96-1060).

B. Whatever Plenary Power Congress May Possess Over Immigration Does Not Bar Heightened Scrutiny Of Section 1409(a)

1. This Court Has Never Extended Plenary Power To Citizenship At Birth

Petitioners here are entitled to the protection of the Equal Protection Clause. While the Court has often referred to the "plenary power" of the federal political branches in regulating immigration to the United States, this Court has never permitted Congress's plenary power to shield citizenship at birth laws from constitutional scrutiny. Indeed, in *Miller v. Albright*, seven members of this Court examined a putative citizen's challenge to Section 1409(a) on equal protection grounds without according any special deference to Congress. *See* 523 U.S. at 433-41 (Stevens, J.) (employing heightened scrutiny); *id.* at 476 (Breyer, J, dissenting) (employing heightened scrutiny); *id.* at 451 (O'Connor, J., concurring in judgment) (employing rational

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for Resolving Two Hundred Years of Uncertainty, 97 Yale L.J. 881 (1988).

basis scrutiny in light of petitioner's lack of standing to raise constitutional sex discrimination claims). *See also Lake v. Reno*, 226 F. 3d 141, 148 (2d Cir. 2000) ("As a United States citizen, Joseph Lake's claim of equal protection . . . is not governed by the standards applied to equal protection claims of aliens, and we have found no case holding otherwise."); *Breyer v. Meissner*, 214 F.3d 416, 424 (3d Cir. 2000) ("Because [this statute] created a gender classification with respect to Breyer's mother's ability to pass her citizenship to her foreign-born child at his birth, the action is subject to heightened scrutiny."); *Wauchope v. U.S. Dep't of State*, 985 F.2d 1407, 1414 (9th Cir. 1993) ("decision as to who is a citizen in the first instance" is "fundamentally different from one concerning individuals as to whose alienage there exists no dispute, such that we should perhaps utilize a more traditional (and hence more rigorous) standard of scrutiny in assessing it").

Miller v. Albright is only the most recent confirmation of this principle. In *Rogers v. Bellei*, 401 U.S. 815, 828-36 (1971), this Court similarly scrutinized a statute governing citizenship at birth in accordance with constitutional standards. In *Rogers*, the foreign-born plaintiff child of a United States citizen mother challenged the gender-neutral five-year residency requirement then imposed on such children who wished to claim statutory citizenship at birth. In upholding the residency requirements, this Court did not rebuff the plaintiff as an alien without standing to raise such constitutional arguments. Rather, the Court acknowledged that Bellei was a citizen for purposes of his claim until such time as the Court determined that he had failed to meet any permissible conditions placed on his citizenship by Congress. *See id.* at 827 (noting plaintiff's claim to "continuing" citizenship). Nor did the Court simply defer to Congress's judgment as to what conditions to place on

statutory citizenship at birth. Instead, the Court satisfied itself that the congressional scheme reflected "careful consideration," and was "purposeful, not accidental." *Id.* at 833. In the absence of a classification requiring heightened review, this Court exercised rational basis scrutiny under the Due Process Clause of the Fifth Amendment, holding that while the residency requirement "may not be the best that could be devised . . . we cannot say that it is irrational or arbitrary or unfair." *Id.*

The Government nevertheless argued below that *Fiallo v. Bell*, 430 U.S. 787 (1977), warrants deference in this case. But as the court of appeals correctly concluded, *Fiallo* does not control here because this case concerns recognition of citizenship at birth, not immigration – a distinction also recognized by the *Fiallo* Court itself. *Nguyen*, 208 F.3d at 534-535; Pet. App. 11a. In *Fiallo*, three sets of unwed natural fathers and their children each sought a special immigration preference by virtue of a relationship to a citizen or resident alien child or parent. Rather than employ full-fledged constitutional scrutiny, this Court deferred to Congress's plenary power in setting immigration policy, examining only whether the challenged statute was based on a "facially legitimate and bona fide reason." *Fiallo*, 430 U.S. at 794. The Court indicated, however, that such deference would not extend beyond immigration, since "in the exercise of its broad power over immigration and naturalization, 'Congress regularly makes rules that would be unacceptable if applied to citizens.'" *Id.* at 792. *See also Mathews v. Diaz*, 426 U.S. 67, 78 (1976) (there is "a legitimate distinction between citizens and aliens [that] may

justify attributes and benefits for one class not accorded to the other").[11]

Given the rationale for the plenary power doctrine, there is good reason not to extend its lenient standard of review to statutory citizenship at birth. Principal among the purposes of the plenary power doctrine was this Court's recognition that Congress and the Executive exercised authority for foreign relations, and that regulation of immigration was a component of that authority *Mathews v. Diaz*, 426 U.S. at 81 n.17 (1976). Citizenship at birth, however, has little relevance to Congress's foreign relations power. Rather, citizenship at birth constitutes recognition of a long-standing status created at the time of a child's birth by virtue of the child's parentage. Plainly, Congress should not have the same broad leeway to draw lines between citizens that may be necessary when dealing with immigration or naturalization. It is unthinkable, for example, that this Supreme Court would defer to Congress's enactment of a law requiring black citizen parents seeking *jus sanguinis* citizenship for their children to submit additional proof beyond that required of white citizen parents. As Justice Breyer cautioned in *Miller*, applying an unusually lenient constitutional standard of review to statutory citizenship at birth would ensure that such statutes – which also apply to married American couples traveling or working abroad – "could discriminate virtually free of independent judicial

[11] Though this Court has sometimes employed more relaxed review when examining immigration provisions affecting the constitutional rights of United States citizens, *see, e.g.*, *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Fiallo v. Bell*, 430 U.S. 787 (1977), such deference is not appropriate when citizenship at birth is the sole issue. *Kleindienst* and *Fiallo* directly concerned immigration benefits sought by or on behalf of aliens, and therefore implicated the considerations that underlie the plenary power doctrine in a way that citizenship at birth does not.

review," placing many children "outside the domain of basic constitutional protections." 523 U.S. at 478 (Breyer, J., dissenting).

None of this is to suggest that Joseph Boulais holds any constitutional right to convey citizenship at birth to his son. Indeed, this is the significance of *Rogers v. Bellei*, 401 U.S. 815 (1971), which held that there is no Fourteenth Amendment right to acquisition of citizenship by being born abroad of an American parent. *Id.* at 831. However, this Court has repeatedly recognized that it is immaterial whether a right is constitutionally or statutorily based for purposes of evaluating whether there is unconstitutional discrimination. Even when the government acts through statute to grant rights that it is under no constitutional mandate to grant, it may not do so in a discriminatory manner. *See Califano v. Westcott*, 443 U.S. 76, 85 (1979) (prohibiting discriminatory distribution of Aid to Families With Dependent Children even though benefits granted by statute); *Califano v. Webster*, 430 U.S. 313, 317 (1977) (barring gender discrimination in statutory old-age insurance); *Califano v. Goldfarb*, 430 U.S. 199, 217 (1977) (holding that dependency test on men but not women to qualify for dependents' benefits under Social Security statute violates the Equal Protection Clause); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 653 (1975) (holding that statutory Social Security widow's benefits must be distributed in a way that does not violate the Equal Protection Clause).

2. Congress's Plenary Powers Have Not Barred Heightened Scrutiny Of Constitutional Violations In Other Areas

Recognition that the citizenship at birth statute is subject to heightened scrutiny is consistent with this Court's rulings

in other substantive contexts where Congress is accorded substantial deference. In none of these contexts has the Court suspended the operation of the Equal Protection Clause.

In *Rostker v. Goldberg*, 453 U.S. 57 (1981), for example, this Court made clear that even though enormous deference is due to Congress's exercise of its sovereign power over national security and foreign affairs, such deference does not trump the heightened scrutiny standards of the Equal Protection Clause. *Rostker* concerned a challenge to a congressional statute requiring only men to register for the draft. A group of male plaintiffs sued arguing that the statute violated equal protection under the Due Process Clause of the Fifth Amendment. In reviewing that argument, the Court first stressed that "[t]he case arises in the context of Congress's authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference." *Id.* at 64-65. Nevertheless, the *Rostker* Court explained that, even though deference may be due because of the "context" of the "congressional choice," still:

> Congress is [not] free to disregard the Constitution when it acts in the area of military affairs. In that area, as any other, Congress remains subject to the limitations of the Due Process Clause . . .

Id. at 67 (internal citations omitted).

Similarly, this Court has stated that taxation is "the exercise of the most plenary of sovereign powers," *Lawrence v. State Tax Comm'n of Miss.*, 286 U.S. 276, 279 (1932), and has noted Congress's "broad power in this area." *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 550

(1983). Nevertheless, there is no dispute that a higher standard of review is appropriate if a tax provision employs a suspect classification, such as race. *Id.* at 547-48. *See also Moritz v. Commissioner*, 469 F.2d 466 (10th Cir. 1972), *cert. denied*, 412 U.S. 906 (1973) (striking down sex-based classification).

Clearly, appropriate deference to congressional choices need not mean giving the legislature carte blanche to create discriminatory schemes based on impermissible stereotypes and antiquated classifications. Constitutional scrutiny of congressional action with respect to putative citizens should be no less rigorous than that applied to these other sensitive areas.

III. AS IN OTHER EQUAL PROTECTION CHALLENGES TO FEDERAL AND STATE STATUTES, THIS COURT CAN PROPERLY GRANT RELIEF BY SEVERING THE OFFENDING PROVISION

A. Congress Would Have Favored Severing The Offending Provision Had It Known Of Its Unconstitutionality

The Equal Protection Clause requires this Court to hold Sections 1409(a)(3) and (4) unconstitutional. In such circumstances, the remedy should respect Congress's choices to the extent possible, based on an evaluation of what Congress would have done had it known of the statute's unconstitutionality. *See INS v. Chadha*, 462 U.S. 919, 931-32 (1982) (citing *Buckley v. Valeo*, 424 U.S. 1, 108 (1976)). *See also New York v. United States*, 505 U.S. 144, 186 (1992). This inquiry is eased considerably because Congress has explicitly provided for severance by including a

severability clause in the statute. A severability clause "creates a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987). Absent strong evidence that Congress intended otherwise, the objectionable provision can be excised from the remainder of the statute. *Id.*

Here, the severance clause included in the INA directs this Court to strike the unconstitutional provisions. *See Chadha*, 462 U.S. at 932 (reconstruction of congressional intent not necessary in light of INA's severance clause).[12] Once severed, the requirements of Section 1409(a)(3) and (4) no longer restrict the conferral of citizenship under 8 U.S.C. § 1401(g) upon children born outside the United States to a citizen father and alien mother. It is undisputed that Boulais meets the remaining requirements under Sections 1409(a)(1) and (2), and Section 1401(g), which would continue to be "fully operative as law." *Chadha*, 462 U.S. at 934 (quoting *Champlin Refining Co. v. Corporation Comm'n*, 286 U.S. 210, 234 (1932)). *See also United States v. Ahumada-Aguilar*, 189 F.3d 1121, 1126 (9th Cir. 1999) (striking Sections 1409(a)(3) and (4) and applying remaining provisions to establish citizenship). There is no evidence whatsoever that Congress intended any other result.

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[12] The severability clause provides:

> If any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

Immigration and Nationality Act, Pub. L. No. 82-414, § 406, 66 Stat. 163, 281 (1952).

This approach is sound for several reasons. First, severance is favored because, as Congress intended when it enacted the severance clause of the INA, it leaves the constitutional portions of the statute intact. This Court has frequently employed this type of localized, minor surgery, particularly when it seeks to avoid rewriting complex legislation. *See Reno v. ACLU*, 521 U.S. 844, 882-83 (1997) (honoring severability clause to sever unconstitutional portion of Communications Decency Act and leave intact remainder of provision); *Chadha*, 462 U.S. 919, 934-35 (1982) (employing severability clause to sever unconstitutional provision of INA). As this Court noted in *Califano v. Wescott*, 443 U.S. 76 (1979), the presence of a "strong severability clause . . . evidences a congressional intent to minimize the burdens imposed by a declaration of unconstitutionality upon innocent recipients of government largesse." 443 U.S. at 90.

Second, severing Sections 1409(a)(3) and (4) comports with the overall statutory scheme. The "virtually unbroken tradition" of transmitting American citizenship from parent to child "at birth," subject only to certain residency requirements, *Miller*, 523 U.S. at 478 (Breyer, J., dissenting), requires a remedy that ensures the continued ability of parents to transmit *jus sanguinis* citizenship to their children. Striking the entire statute, or imposing the more stringent legitimation requirements and time limits now applicable to fathers on all parents, would frustrate Congress's intent. *See Califano v. Wescott*, 443 U.S. 76, 89-90 (1979) (approving extension of statute to excluded class); *Frontiero v. Richardson*, 411 U.S. 677, 691 (1973) (invalidating statutory schemes only "insofar as they require a female member [of the military] to prove the dependency of her husband"). Further, as discussed *supra* at Point I.B.1., the statute is not finely honed to achieve its asserted governmental purpose,

but relies on rough (and therefore, often inaccurate) proxies to assess whether non-marital children have ties to their citizen parents and the United States. Thus, eliminating sex-based classifications by striking Sections 1409(a)(3) and (4) will not undermine some precise and refined statutory scheme.

Third, severance of Sections 1409(a)(3) and (4) fully redresses the unconstitutionality challenged in this action. As discussed in Point I, *supra*, citizen mothers are essentially required to prove three elements under the current statute: physical presence, nationality, and maternity. 8 U.S.C. § 1409(c). While the statute does not specify a standard of proof applicable to establishing maternity, the Government has conceded that the standard is "clear and convincing" evidence. Brief for Respondent, at 32, *Miller v. Albright*, 523 U.S. 420 (1998) (No. 96-1060) (stating there is "little practical difference in the proof of blood relationship required" for mothers and fathers). Upon severance of Sections 1409(a)(3) and (4), citizen fathers will also be required to prove three elements to transmit citizenship to their out-of-wedlock children: physical presence, nationality, and paternity. Thus, this is a case in which this Court can easily cure the challenged unconstitutionality.[13]

Finally, this approach is particularly appropriate where, as here, the "question is not one of zero-sum competition between males and females as mothers and fathers, but of the ability of each to transmit benefits to . . . their children." Mary Ann Case, "*The Very Stereotype the Law Condemns*": *Constitutional Sex Discrimination Law as a Quest for*

[13] While mothers will remain subject to different physical presence requirements than fathers, Boulais meets the requirements applicable to fathers under Section 1401(g), and thus does not challenge that provision.

Perfect Proxies, 85 Cornell L. Rev. 1447, 1480 (2000) (discussing potential remedies in *Miller*). In contrast to circumstances addressed in *Rainey v. Chever*, 527 U.S. 1044 (1999), *denying cert. to* 510 S.E. 2d 823 (Ga. 1999) (Thomas, J., dissenting) (concerning inheritance), *Lehr v. Robertson*, 463 U.S. 248 (1983) (concerning consent to adoption), or *Parham v. Hughes*, 441 U.S. 347 (1979) (concerning wrongful death), where finite benefits are at issue and must be fairly distributed among multiple parties with legitimate and competing claims, generosity to fathers in expanding rights to transmit citizenship undermines no one else's claims or rights. *See* Mary Ann Case, *supra* at 1483. Thus, considerations that might augur in favor of contracting, rather than expanding, rights are absent here.

B. This Court's Exercise Of Its Remedial Authority To Strike The Discriminatory Provisions Of Section 1409(a) Does Not Constitute An Illicit Grant Of Citizenship

Boulais and Nguyen do not ask this Court to "grant" citizenship. In upholding Boulais's claim that he is entitled to transmit citizenship at birth to his son, this Court will not be impermissibly exercising a power reserved to Congress, but will be simply acknowledging Nguyen's pre-existing status, which began at birth. *See Miller*, 523 U.S. at 432 (Stevens, J.) (judgment for plaintiff in *Miller* "would confirm her pre-existing citizenship rather than grant her rights that she does not now possess"); *id.* at 489 (Breyer, J., dissenting) (acknowledging citizenship at birth does not intrude on congressional power); *Rogers v. Bellei*, 401 U.S. 815, 827 (1971) (noting claim for "continuing" citizenship). In the absence of the unconstitutional portions of Section 1409(a), Nguyen's citizenship at birth can now be confirmed through regular administrative channels. Boulais and Nguyen ask

simply that this Court remove those unconstitutional impediments and let the remaining statute operate on Nguyen's behalf.

While the Government suggested in its brief in opposition to *certiorari* in this case, that *INS v. Pangilinan*, 486 U.S. 875 (1988), bars this Court from exercise of its equitable power to remedy the unconstitutionality here, this is a misstatement of the case. *See* Resp't Op. Cert. Br. at 8 n.4. *Pangilinan* concerned a group of Filipino nationals who would have been eligible for naturalization under the Nationality Act of 1940 if they had filed their applications before December 31, 1946. More than 30 years later, they sought equitable relief for their failure to timely file claiming, among other things, that official acts of the United States government had frustrated their efforts to meet the deadline. This Court found that the official acts complained of did not give rise to a violation of the Fifth Amendment, *see id.* at 885-86, and further, that under the circumstances, the courts had no authority to fashion an equitable remedy according citizenship to the plaintiffs. *See id.* at 883-84.

Far from limiting this Court's ability to remedy unconstitutionality, *Pangilinan* simply held that no equitable remedy was available *in the absence* of any unconstitutional government action. *See id.* Had this Court intended to outlaw all equitable relief in immigration-related matters, there would have been no need to separately opine on the absence of any constitutional due process violation. Instead, the Court's opinion stands solely for the proposition that equitable relief is not available in the absence of any actionable constitutional violation. *See Wauchope*, 985 F. 2d at 1418 (stating that *Pangilinan* "does not speak to the courts' capacity to utilize traditional constitutional remedies to rectify constitutional violations"). Moreover, the relief

barred by this Court in *Pangilinan* was the equitable grant of naturalized citizenship. In sharp contrast, the relief sought here is not this Court's *grant* of citizenship at birth, but severance of unconstitutional provisions of the Immigration and Naturalization Act that violate petitioners' equal protection rights. *See Lake v. Reno*, 226 F. 3d 141, 148-49 (2d Cir. 2000) (holding that *Pangilinan* is limited to naturalization and is "inapposite" to citizenship at birth claim).

Though *Pangilinan* itself is inapposite, the Court should not lose sight of the extreme nature of the position the Government asks it to embrace. Under the Government's view, no court could ever resolve the constitutionality of a statutory provision affecting citizenship because the remedy sought in such cases – striking the offending provision – would result in the conferral of citizenship contrary to Congress's precise intent in enacting the statute. Thus, under this view, a statute that conferred citizenship upon only the children of white citizens would be beyond this Court's power to cure because the remedy – extending the benefits of the statute to the excluded non-white class – would violate the principle that "only Congress has the power to set requirements for acquisition of citizenship by persons not born within the territory of the United States." *Miller*, 523 U.S. at 456 (Scalia, J., concurring in the judgment). Neither the Constitution nor case law support such a crabbed view of this Court's remedial authority.

This, however, is not a case where Congress evinced an intent to deny citizenship to a particular group – here, the children of citizen fathers. To the contrary, Congress explicitly intended members of this group to receive the benefits of citizenship. The offending provision merely places an unconstitutional procedural burden on this group to

achieve recognition of their status. The remedy sought by Boulais and Nguyen – acknowledgement of Nguyen's citizenship at birth – is effectuated by the statute itself once this Court has taken the step of striking the unconstitutional provisions of Section 1409(a) in accordance with the INA's severability clause. Far from usurping Congress's authority, this approach respects congressional intent to extend uninterrupted benefits under the statute even if unconstitutional portions are severed. This relief is well within this Court's authority.

CONCLUSION

For the foregoing reasons, the Court should declare 8 U.S.C. §§ 1409(a)(3) and (4) unconstitutional and reverse the judgment below.

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Supreme Court of the United States

NOV 13 2000

TUAN AHN NGUYEN AND JOSEPH BOULAIS,

Petitioners,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE NATIONAL WOMEN'S LAW CENTER, ET AL. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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46pp

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National Partnership for Women & Families

Northwest Women's Law Center

Texas Civil Rights Project

Women's Law Project

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. THE GENDER-BASED PROVISIONS OF § 1409 ARE SUBJECT TO HEIGHTENED SCRUTINY 4

II. THE GENDER CLASSIFICATIONS IN §§ 1409 (a)(3) AND (a)(4) ARE BASED ON OVERBROAD STEREOTYPES ABOUT THE ROLES AND CAPACITIES OF MEN AND WOMEN AS PARENTS. 7

III. THE LEGISLATIVE HISTORY OF §1409 REVEALS THAT THE PROVISION WAS INTENDED TO PRESERVE NOW OUTMODED, GENDER-BASED PRINCIPLES FROM COMMON LAW. 13

A. The Provision Was Intended to Reinforce the Discriminatory and Discredited Assignment of Gender Roles with Respect to Out-of-Wedlock Children Under Common Law 14

B. The 1986 Amendments to § 1409 Were Intended to Maintain the Discriminatory Common Law Framework and Make It Easier to Administer 20

C. The Purported Objectives of Encouraging Relationships Between Father and Child, and Between the Child and the United States, Are Post-Hoc Rationalizations. 23

IV. SECTIONS 1409(a)(3) AND (a)(4) ARE NOT SUBSTANTIALLY RELATED TO THE ASSERTED GOVERNMENT OBJECTIVES OF ENSURING THAT A FOREIGN-BORN, OUT-OF-WEDLOCK CHILD DOES NOT BECOME A PUBLIC CHARGE OR DETERRING FRAUDULENT CLAIMS OF PATERNITY 25

A. Sections 1409(a)(3) and (a)(4) Are Not Substantially Related to the Governmental Objective of Ensuring that a Foreign-born, Out-of-Wedlock Child Does Not Become a Public Charge. 25

B. Sections 1409(a)(3) and (a)(4) Are Not Substantially Related to the Governmental Objective of Deterring Fraud. 29

CONCLUSION 30

APPENDIX

TABLE OF AUTHORITIES

Page(s)

Cases:

Beckett v. State ex rel. Rothert, 30 N.E. 536 (Ind. App. 1892) 16

Easley v. Gordon, 51 Mo. App. 637, 1892 WL 1668 (1892) 15

Friesner v. Symonds, 20 A. 257 (N.J. Prerog. Ct. 1890) 15

Glidden v. Nelson, 15 Ill. App. 297, 1884 WL 10141 (1884) 15

Jackson v. Jackson, 8 Or. 402 (1880) 14

Kirchberg v. Feenstra, 450 U.S. 455 (1981) 5

Miller v. Albright, 523 U.S. 420 (1998) 5, 7, 12, 16

Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) 5, 6

Nguyen v. INS, 208 F.3d 528 (5th Cir. 2000) 8

State v. Paine, 23 Tenn. 523, 1843 WL 1898 (1843) 14

State v. Tieman, 73 P. 375 (Wash. 1903) 15

Town of Hudson v. Hills, 8 N.H. 417, 1836 WL 1290 (1836) 15

United States v. Virginia, 518 U.S. 515 (1996) 5, 6, 12, 23

Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) 12

Statutes:

8 U.S.C. § 1401(g) 5

8 U.S.C. § 1409 ..... *passim*

8 U.S.C. § 1409(a) ..... *passim*

8 U.S.C. 1409(a)(1) ..... *passim*

8 U.S.C. § 1409(a)(3) ..... *passim*

8 U.S.C. § 1409(a)(4) ..... *passim*

8 U.S.C. § 1409(c) 5, 6

10 U.S.C. § 1093(b) 11

42 U.S.C. § 602(a)(2) 26

42 U.S.C. § 654 26

42 U.S.C. § 654(20)(A) 26

42 U.S.C. § 666 26

42 U.S.C. § 666(a)(1) 27

42 U.S.C. § 666(a)(4) 27

42 U.S.C. § 666(a)(5)(A) 26

42 U.S.C. § 666(a)(5)(B)(i) 27

42 U.S.C. § 666(a)(5)(C) 26

42 U.S.C. § 666(a)(5)(D)(ii) 26

42 U.S.C. § 666(a)(5)(D)(iii) 26

42 U.S.C. § 666(a)(5)(G) 27, 29

42 U.S.C. § 666(a)(5)(J) 27, 28

42 U.S.C. § 666(a)(16) 27

42 U.S.C. § 666(b) 27

42 U.S.C. § 667 27

Act to Amend the Law Relative to Citizenship and Naturalization, ch. 344, 48 Stat. 797 (1934) 16

Nationality Act of 1940, ch. 876 54 Stat. 1137 (1940) ..... *passim*

Pub. L. No. 95-432 § 1, 92 Stat. 1046 (1978) 24

Ariz. Rev. Stat. § 25-501 (1999) 19

Cal. Fam. Code § 3900 (1994) 19

Conn. Gen. Stat. Ann. § 46b-84 (1995) 19

Del. Code Ann. tit. 13 § 501 (1999) 19

Fla. Stat. ch. 61.13 (1997) 19

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INTEREST OF *AMICI CURIAE*

Amici curiae are organizations that have a strong interest in ensuring that all persons receive the equal protection of the law under the Constitution.[1] The concerns of some *amici* focus on equality of opportunity without discrimination based on gender. The work of other *amici* is focused on child support and other issues of concern to families. A description of each of the *amici* is set forth in the Appendix hereto.

SUMMARY OF ARGUMENT

Petitioner Joseph A. Boulais, an American citizen, is the father of Tuan Anh Nguyen, born in Vietnam of a Vietnamese mother. Boulais raised his son in the United States since Nguyen was six, established his biological paternity through DNA testing, and obtained an Order of Parentage from a Texas court. Nevertheless, Boulais was unable to convey his citizenship to his son. The statutory provisions challenged in this case, 8 U.S.C. §§ 1409(a)(3) and (a)(4), require an unwed citizen father, but not an unwed citizen mother, to agree in writing to provide financial support and legitimate, acknowledge, or adjudicate paternity of the child before the child turns 18, in order to convey citizenship to an out-of-wedlock child born abroad. Because Boulais failed to satisfy these statutory requirements – even though he raised and supported his son in the United States – he failed to convey his citizenship to his son.

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[1] The parties' written consents to the filing of this brief have been filed with the Court. No counsel for any party authored this brief in whole or in part, and no person or entity other than the *amici curiae* and their counsel made any monetary contribution to the preparation or submission of this brief.

The challenged provisions, §§ 1409(a)(3) and (a)(4), define the rights of citizen parents to convey citizenship to their children on the basis of gender, and thus are subject to heightened scrutiny. As this Court's precedents establish, for these gender-based provisions to survive heightened scrutiny, the Government must demonstrate "an exceedingly persuasive justification." These provisions must be shown to serve "important governmental objectives" and the means employed must be "substantially related to the achievement of those objectives." The justifications cannot be based on stereotypes of the roles and capacities of men and women, and they cannot be post hoc rationalizations.

These provisions cannot survive heightened scrutiny because they are derived from overbroad, gender-based stereotypes: that unwed mothers, because they give birth, will take responsibility for raising and financially supporting the child, while unwed fathers are likely to be unaware of the birth and will carry out no responsibilities other than those they formally accept or that are imposed by law. To assume that women's role in childbirth always determines which parent actually assumes responsibility after birth is an overbroad generalization, as the facts in this case and an increasing body of research demonstrate.

Although most single parents are mothers, an increasing number of single fathers, including unwed fathers, are raising children. Contrary to the stereotype that unwed fathers are not even aware of their child's birth, many unwed fathers have relationships with their children and their children's mother at the time of the birth. Moreover, not all unwed mothers carry a pregnancy to term with the intent to bear or raise a child. And, while most child support is owed by noncustodial fathers to custodial mothers, in 1998 noncustodial mothers owed nearly $3 billion in child support to custodial fathers.

The legislative history as well as the current structure of § 1409 demonstrates that the provision is based on outmoded stereotypes and laws. The gender-based statutory framework is rooted in the different rights and responsibilities assigned to mothers and fathers of out-of-wedlock children under the common law. Under common law, a mother was solely responsible for nonmarital children, and a mother's right to convey citizenship to her out-of-wedlock child derived from this responsibility. Conversely, under common law, a father had sole authority over his marital children and wife; accordingly, a father conveyed his citizenship to his "legitimate" child. These gender-based distinctions were codified in 1940. In 1986, the specific procedures for conveying citizenship to an out-of-wedlock child through the father were modified to make them easier to administer by the State Department, but the gender-based distinctions flowing from the stereotypes were preserved.

The Government now offers several justifications for these gender-based distinctions, including the argument that they are designed to foster relationships between unmarried fathers and their children and between children of unmarried fathers and the United States. But the legislative history of the immigration and nationality laws shows that, while these objectives were considered in relation to different provisions – a residency requirement for children born abroad to non-citizen fathers in the 1940 Act (since repealed) and a provision governing the issuance of visas, which are limited in number, to non-citizen family members, in the 1986 Act – they do not pertain to § 1409.

The legislative history of the 1986 amendments to § 1409 does refer to the purposes of preventing a child from becoming a public charge and preventing fraud. However, §§ 1409(a)(3) and (a)(4) are not substantially related to these objectives. The requirements in

§§ 1409(a)(3) and (a)(4) are insufficiently related to securing legally enforceable support to provide any meaningful protection against the child's becoming a public charge. For that reason, they also do not provide any meaningful deterrent to the assertion of false claims of paternity in order to confer citizenship. Indeed, the history of the 1986 amendments makes clear that neither § 1409(a)(3) nor (a)(4) was designed to prevent fraudulent claims of paternity; rather, it was § 1409(a)(1), which requires that a blood relationship between a citizen father and his child be established by clear and convincing evidence, that had that purpose.

Section 1409(a)(1) also renders the gender-based §§ 1409(a)(3) and (a)(4) superfluous. Its requirement that paternity be established by "clear and convincing evidence" is sufficient to secure a temporary order of child support and provides the basis for establishing paternity and securing a permanent child support order under the laws of all states. Moreover, this requirement satisfies the governmental objective of preventing fraudulent claims of paternity as well, and can be met at any time, with particular accuracy and administrative ease, by genetic tests.

In sum, because §§ 1409(a)(3) and (a)(4)'s gender-based requirements are based on overbroad stereotypes and are not substantially related to any important government objective, they cannot survive heightened scrutiny.

ARGUMENT

I. THE GENDER-BASED PROVISIONS OF § 1409 ARE SUBJECT TO HEIGHTENED SCRUTINY.

The statutory provision at issue in this case, 8 U.S.C. § 1409, imposes different standards on American

citizen fathers and American citizen mothers for conveying their citizenship to an out-of-wedlock child born abroad.[2] A citizen mother of an out-of-wedlock child automatically confers citizenship on her child at birth, as long as she has met the residency requirement of § 1409(c).

Citizen fathers must meet a residency requirement, *see* 8 U.S.C. § 1401(g), and establish a blood relationship by clear and convincing evidence, *see* 8 U.S.C. § 1409(a)(1). In addition, a citizen father, but not a citizen mother, must agree in writing to provide financial support until the child is 18, *see* 8 U.S.C. § 1409(a)(3), and take the required action to acknowledge or legitimate the child before the child reaches 18 years of age, *see* 8 U.S.C. § 1409(a)(4).

Because § 1409(a) defines the rights of citizen parents to convey citizenship to their children on the basis of gender, it is subject to heightened scrutiny.[3]

As stated by this Court in *United States v. Virginia*, 518 U.S. 515 (1996) ("*VMI*"), "[p]arties who seek to defend gender-based government action must demonstrate 'an exceedingly persuasive justification' for that action." *Id.* at 531, *citing J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136-37 & n.6 (1994) and *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982); *see also Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981), *citing Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 273 (1979). Moreover, "[t]he burden of justification is

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[2] Unlike the situation that led to the decision of a divided court in *Miller v. Albright*, 523 U.S. 420 (1998), the father is a party in this case, placing the gender discrimination issue directly before the Court.

[3] As discussed by petitioners, the fact that the statute at issue is related to immigration law does not mean that it is subject to a lower standard of review.

demanding and it rests entirely on the State." *VMI*, 518 U.S. at 533, *citing Mississippi Univ. for Women v. Hogan*, 458 U.S. at 724. The Government must show that the gender-based provision "serves 'important governmental objectives and that the discriminatory means employed,' are 'substantially related to the achievement of those objectives.' . . . The justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *VMI*, 518 U.S. at 533, *quoting Mississippi Univ. for Women*, 458 U.S. at 724. Moreover, that a "statutory policy discriminates against males rather than against females does not exempt it from scrutiny or reduce the standard of review." *Mississippi Univ. for Women*, 458 U.S. at 723. As the Court pointed out in *Mississippi University* and as is true in this case, even when discrimination is apparently directed at men, it can reflect stereotypes that hurt women as well. *See id.* at 729.

The requirement in § 1409(a)(1) that a citizen father of an out-of-wedlock child establish his blood relationship by clear and convincing evidence is not at issue in this case. This requirement was satisfied by petitioner Boulais, and mothers also must establish a blood relationship under 8 U.S.C. § 1409(c).[4] However, the different requirements imposed on citizen fathers and mothers by the provisions that are at issue, §§ 1409 (a)(3) and (a)(4), fail to meet the heightened scrutiny test established by this Court. The gender classifications in the statute are based on "overbroad generalizations" about the roles and capacities of men and

[4] While a mother will be aware of the birth, establishing maternity of a particular child may require additional evidence where birth records are unavailable or incomplete.

women as parents and outmoded, gender-based common law principles. As recognized by Justice O'Connor, "[i]t is unlikely . . . that any gender classifications based on stereotypes can survive heightened scrutiny." *Miller*, 523 U.S. at 452 (O'Connor, J., concurring). There is no "exceedingly persuasive justification" for these gender-based distinctions as this Court's precedents require, for they are not substantially related to any genuine, important governmental objectives.

II. THE GENDER CLASSIFICATIONS IN §§ 1409 (a)(3) AND (a)(4) ARE BASED ON OVERBROAD STEREOTYPES ABOUT THE ROLES AND CAPACITIES OF MEN AND WOMEN AS PARENTS.

The father in this case, U.S. citizen Joseph Boulais, brought his son, Tuan Anh Nguyen, an out-of-wedlock child of a Vietnamese mother, to the United States when he was six, and raised him. (J.A. at 20-21.) The whereabouts of Nguyen's mother, or even if she is alive, are unknown. *Id.* Boulais also established his biological paternity by "clear and convincing evidence" – a DNA test – and obtained an "Order of Parentage" from a Texas court, as the lower court found. (J.A. at 15-19, 22-29.) Nevertheless, Boulais failed to convey his citizenship to his son because he failed to comply with the requirements of §§ 1409(a)(3) and (a)(4) – agreeing in writing to support his child and taking action to acknowledge paternity or legitimate Nguyen before he turned 18. Contrary to stereotype, Boulais – an unwed father – provided for and raised his son in the United States. However, because he failed to satisfy the statutory requirements prescribed on the basis of the stereotype that an unwed father is uninvolved, he cannot convey citizenship to his son.

Had Boulais been the mother, citizenship would have been conveyed to Nguyen at birth. A U.S. citizen

mother is not required to comply with §§ 1409(a)(3) and (a)(4). Indeed, she would have conveyed citizenship to her child even if she had left him at birth to be raised abroad by a father who was not a U.S. citizen and returned by herself to the United States without any further contact or support.

The Government argued, and the court below concluded, that the additional requirements for conveying citizenship imposed on citizen fathers do not violate equal protection guarantees because they help to ensure reliable proof of a biological relationship and meet "the important governmental objectives of encouraging healthy parent-child relationships while the child is a minor, and fostering ties between the foreign born child and the United States," because the father, unlike the mother, "will not necessarily be present at the birth of the child or even know of the child's existence, making it impossible for the citizen father to develop a healthy relationship with the child." *Nguyen v. INS*, 208 F.3d 528, 535 (5th Cir. 2000). The Government also argued that the requirements would help "ensure that the child will not become a public charge." Respondent's brief below at 35, *Nguyen* (No. 98-60418) [hereinafter Respondent's Br.]. The Government did not explicitly address why the statute did not require mothers to agree to provide support, but did state that mothers "*typically* will have custody of the child immediately after birth." *Id.* at 36 (emphasis added).

The assumptions used to justify the requirements of §§ 1409(a)(3) and (a)(4) that, to convey citizenship, unwed fathers, but not mothers, must, in addition to establishing their biological relationship by clear and convincing evidence, agree to provide support for the child and take some additional action to acknowledge or legitimate the child before the child is 18, are based on the very type of gender-based stereotypes this Court has repeatedly rejected. Unwed mothers, because they give birth, are assumed to

take sole responsibility for raising and financially supporting the child. By contrast, unwed fathers are assumed to carry out no responsibilities other than those they formally accept or that are imposed by law.

To assume that women's role in childbirth always determines which parent actually assumes responsibility post birth is an "overbroad generalization," as the facts in this case and an increasing body of research demonstrate. Such stereotyped assumptions hurt both mothers and fathers.

Both quantitative and qualitative research into the relationships between unwed fathers and their children demonstrate that the stereotypes underlying the requirements of §§ 1409(a)(3) and (a)(4) are unrepresentative of and unfair to many unwed fathers, not only Boulais. Although most single parents are mothers, many unwed fathers are raising their own children. According to the Census Bureau, in 1998 there were 14 million parents raising minor children whose other natural parent did not live with them. More than two million of these custodial parents (15 percent) were fathers, and nearly 400,000 (18 percent) of these custodial fathers have never been married.[5] During the 1980s, the number of custodial fathers grew by 42 percent; during the same

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[5] *See* Timothy Grall, *Child Support for Custodial Mothers and Fathers*, *in* Current Population Reports (U.S. Census Bureau), Oct. 2000, at 1, 2 & Table A (calculations based on census data) [hereinafter *Child Support for Custodial Mothers and Fathers*]. Some additional proportion of custodial fathers may have been unmarried at the time of the birth of their child but may have subsequently married a woman other than the mother; they would be reported as "married" custodial fathers by the Census Bureau, or as "divorced" if they subsequently divorced.

period, the number of custodial mothers grew by only 15 percent.[6]

Empirical research also shows that, contrary to the stereotyped assumptions underlying §§ 1409(a)(3) and (a)(4), many unwed fathers know of their child's birth and, even if they do not become the child's custodial parent, have a relationship with the child and its mother at the time of the birth. Data from a study conducted in several cities across the United States show that 81 percent of the responding unwed mothers stated that the father of their child provided financial help during their pregnancy and three-quarters of mothers stated that the father visited them and their baby in the hospital after the child was born.[7]

Far from being unaware of their child's birth, many unwed fathers are cohabiting with their child's mother at the time of the birth. Between 1990 and 1994, the percentage of out-of-wedlock births to cohabiting but unmarried parents had increased to 39 percent.[8]

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6 *See* Daniel Meyer, *Fathers and the Child Support System*, *in* Child Support: The Next Frontier 94 (J. Thomas Oldham & Marygold S. Melli eds., 2000).

7 *See Dispelling Myths about Unmarried Fathers*, Fragile Families Research Brief (Bendheim-Thomas Center for Research on Child Wellbeing & Social Indicators Survey Center), May 2000, at 2, *available at* http://crcw.princeton.edu/CRCW/papers/researchbrief1.pdf. *See also* Rebekah Levine Coley & P. Lindsay Chase-Lansdale, *Father's Involvement with their Children Over Time*, *in* Poverty Research News, Mar.-Apr. 2000, at 13 (half of all the unwed fathers surveyed were either highly involved with the child at the time of the child's birth or became more involved during the child's pre-school years).

8 *See* Larry Bumpass & Hsien-Hen Lu, *Cohabitation: How the Families of U.S. Children are Changing*, *in* Focus (University of Wisconsin-Madison Institute for Research on Poverty), Spring 2000, at 6; *see also* Sara McLanahan, et al., *Unwed Parents or Fragile*

[Footnote continued on next page]

Furthermore, although having a formal support order increases the likelihood and amount of support provided to a child, this support and involvement can occur in the absence of any formal child support arrangement. According to the Census Bureau, almost half (47.5 percent) of custodial parents without a child support award or agreement received some noncash support from the noncustodial parent.[9]

The stereotype that because women give birth, unmarried mothers will assume responsibility for caring for and supporting the child places a heavy burden of expectation on women, and also is subject to many exceptions. Not all unwed mothers, either in the United States or abroad, carry a pregnancy to term because of an intent to bear or raise a child. Family planning is lacking in many countries, and abortions in particular are not available legally and safely to all unwed citizen women who are abroad.[10] Approximately 76,000 children born to

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[Footnote continued from previous page]
Families': Implications for Welfare and Child Support Policy (Bendheim-Thomas Center for Research on Child Wellbeing), May 15, 2000, at 14, *available at* http://crcw.princeton.edu/crcw/papers/papers.htm (indicating that the cohabitation rate among these fragile families in the late 1990s might be as high as 54 percent).

9 *See Child Support for Custodial Mothers and Fathers*, *supra*, at 5.

10 More than 150 million women abroad desire, but lack, family planning services, and 150,000 women a year abroad die annually because of the lack of family planning services. U.S. Department of State, Bureau of Population, Refugees and Migration, *Reproductive Rights and Reproductive Health* (Feb. 5, 1999), *available at* http://www.state.gov/www/global/prm/fs_reproductive.html; President's Remarks on Legislative Agenda for International Family Planning Assistance, 36 Weekly Comp. Pres. Doc. 765 (Apr. 7, 2000). Furthermore, citizen women who depend on U.S. military hospitals abroad to provide family planning services may not obtain abortions at those hospitals. 10 U.S.C. § 1093(b).

unwed mothers in the United States were relinquished for adoption between 1989 and 1995.[11] And, while § 1409(a)(3) requires only unwed fathers to state that they will provide child support, on the assumption that no parallel requirement for mothers is needed, data show that in 1997, noncustodial mothers owed nearly $3 billion in child support to custodial fathers.[12]

The differing requirements that §§ 1409(a)(3) and (a)(4) impose on citizen mothers and fathers thus are based on overbroad stereotypes about the roles and capacities of mothers and fathers of out-of-wedlock children. Moreover, even when stereotypes are supported by empirical data or represent a generally accurate description of reality, this Court has been clear that they cannot form the basis for legislation when functional, gender-neutral classifications are available. *See e.g.*, *Miller*, 523 U.S. at 460 (Ginsburg, J., dissenting); *VMI*, 518 U.S. 541-44; *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975). As this Court's precedents emphasize, the constitutional

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[11] Stephanie J. Ventura & Christine A. Bachrach, *Nonmarital Childbearing in the United States, 1940-1999*, *in* National Vital Statistics Reports (Centers for Disease Control), Oct. 18, 2000, at 17 and Anjani Chandra et al., *Adoption, Adoption Seeking, and Relinquishment for Adoption in the United States*, *in* Advance Data (Centers for Disease Control), May 11, 1999, at 9 (calculation based on the number of reported births to unwed mothers between 1989 through 1995 and the percent of those births that were relinquished for adoption). Additionally, more recent data show that 30,800 infants were abandoned in U.S. hospitals in 1998. U.S. Department of Health and Human Services, Administration for Children and Families, *Abandoned Babies – Preliminary National Estimates* (July 19, 2000), *available at* http://www.acf.dhhs.gov/news/stats/abandon.htm.

[12] *Child Support for Custodial Mothers and Fathers*, *supra*, at 4 (custodial fathers were due $2.7 billion of child support and custodial mothers were due $26.4 billion of child support in 1997).

guarantee of equal protection must protect the rights of those who fall outside the stereotype.

III. THE LEGISLATIVE HISTORY OF § 1409 REVEALS THAT THE PROVISION WAS INTENDED TO PRESERVE NOW OUTMODED, GENDER-BASED PRINCIPLES FROM COMMON LAW.

The legislative history as well as the current structure of § 1409 demonstrates that it is based on outmoded stereotypes. The gender-based statutory framework is rooted in the different rights and responsibilities assigned to mothers and fathers of out-of-wedlock children under common law. Under common law, mothers were responsible for nonmarital children, and the mother's right to convey citizenship to her out-of-wedlock child derived from this responsibility. In contrast, common law granted a father authority over his marital children and wife; accordingly, a father conveyed his citizenship to his "legitimate" child. Even before the citizenship statutes explicitly addressed the conveyance of citizenship to out-of-wedlock children, U.S. State Department practice reflected these discriminatory principles. Section 205 of the Nationality Act of 1940, ch. 876, 54 Stat. 1137, 1139-40 (1940), the predecessor of § 1409, was intended to codify this gender-based practice concerning citizenship of nonmarital children. In 1986, the statute was amended; the specific procedures for conveying citizenship to an out-of-wedlock child through the father, codified as § 1409 since 1952, were modified to make them easier to administer by the State Department, but the gender-based stereotypes about unwed fathers and mothers, dating back to common law, were preserved and reinforced.

The Government now offers several justifications for these gender-based distinctions, including the argument that they are designed to foster relationships between

unmarried fathers and their children and between children of unmarried fathers and the United States. But the legislative history shows that these objectives were not considered in relation to § 1409, but in connection with very different provisions of the law. Thus, as to § 1409, these relationship objectives are post hoc rationalizations. The legislative history of the 1986 amendments to § 1409 does refer to the purposes of preventing fraud and preventing a child from becoming a public charge. However, the gender-based approach of § 1409 continues to be based on overbroad stereotypes, and is not substantially related to these objectives. *See* Section IV *infra*.

A. The Provision Was Intended to Reinforce the Discriminatory and Discredited Assignment of Gender Roles with Respect to Out-of-Wedlock Children Under Common Law.

Under the common law of coverture, married fathers had legal authority over their wives and children. *See, e.g., Jackson v. Jackson*, 8 Or. 402, 403 (1880) ("By the common law, a father has the paramount right to the care and custody of his minor children, unless it be shown that he is a man of grossly immoral principles or habits, or that he has not the ability to provide for them, or that they have been ill-used by him."); *State v. Paine*, 23 Tenn. 523, 1843 WL 1898, at *8 (1843) (recognizing that under common law, "women and children . . . have been [held] as the property of the husband and father, and having no will

of their own, no rights in contradiction to his power and authority. . . ."). [13]

The corollary of the rules of coverture was that fathers had no responsibility for their out-of-wedlock children unless they chose to legitimate them; nonmarital children were the sole responsibility of their mothers. [14]

Under the English common law, a child born out of wedlock was "nullius filius, the son of no one," and neither parent had an obligation to support that child. *Friesner v. Symonds*, 20 A. 257, 259 (N.J. Prerog. Ct. 1890); *State v. Tieman*, 73 P. 375, 376 (Wash. 1903). However, in the United States, "the law, from a very early day, has recognized the mother of a bastard as its natural guardian, and as such has imposed upon her the duty of its maintenance, and given her a right to its custody, and to its services." *Friesner*, 20 A. at 259. Therefore, courts held that it was "well settled that the mother of an illegitimate child has a right to the custody and control of the child as against the putative father, and is bound to maintain it as its natural guardian." *Town of Hudson v. Hills*, 8 N.H. 417, 1836 WL 1290, at *2 (1836). Thus, "the mother of an illegitimate child is, at common law, under the primary duty to support it." *Easley v. Gordon*, 51 Mo. App. 637, 1892 WL 1668, at *2 (1892). In the late 19th and early 20th centuries, it was well established in most American jurisdictions that, in the absence of a statute, the father was under no legal obligation to support his illegitimate child. *See, e.g., Glidden v. Nelson*, 15 Ill. App. 297, 1884 WL

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[13] *See generally*, Kristin Collins, Note, *When Fathers' Rights Are Mothers' Duties: The Failure of Equal Protection in Miller v. Albright*, 109 Yale L.J. 1669, 1680-93 (2000) [hereinafter Collins].

[14] This rule reinforced coverture's basic principle of patrilineal property and status transmission in marriage. Collins, 109 Yale L.J. at 1687.

10141, at *2 (1884), *Beckett v. State ex rel. Rothert*, 30 N.E. 536 (Ind. App. 1892).

Early citizenship law and practice followed these distinct, but equally gender-biased, common law traditions. Consistent with the rules of coverture, for many years the citizenship statutes allowed citizenship to be conveyed only by married citizen fathers, not by married citizen mothers. *See generally Miller v. Albright,* 523 U.S. at 460-71 (Ginsburg, J., dissenting). Prior to 1940, the citizenship statutes did not explicitly address the situation of out-of-wedlock children of U.S. citizen parents.[15] However, consistent with common law rules governing the status of unwed mothers and fathers, in the early 20th century, the State Department allowed citizen mothers to transmit citizenship to their out-of-wedlock children; citizen fathers could not transmit citizenship to their out-of-wedlock children without legitimating them. *See To Revise and Codify the Nationality Laws of the United States into a Comprehensive Nationality Code: Hearings before the House Comm. on Immigration and Naturalization on H.R. 6127, superseded by H.R. 9980,* 76th Cong. 431

[15] In 1934, a provision was adopted that permitted transmission of citizenship by *either* a citizen mother or father to a child born abroad. Act to Amend the Law Relative to Citizenship and Naturalization, ch. 344, 48 Stat. 797 (1934); 39 Op. Atty. Gen. 397, 398 (1939). The provision was silent as to whether the transmission of citizenship by either parent could extend to out-of-wedlock children. The enactment of this provision raised doubts as to the citizenship of children born abroad to unwed citizen mothers prior to the date on which the 1934 Act became effective. *See* 39 Op. Atty. Gen. at 398. These questions were resolved by the 1940 Nationality Act, which codified the discriminatory treatment of mothers and fathers as to their ability to transmit citizenship to out-of-wedlock children.

(1940) (1945 reprint) [hereinafter *1940 Hearings*] (Proposed Code with Explanatory Comments).[16]

What may appear at first to be the superior "right" of an unwed mother to transmit citizenship to her child was really the correlate of her sole responsibility, under common law, for an out-of-wedlock child. The unwed father – having no responsibility toward his out-of-wedlock child under common law unless he legitimated the child – similarly did not convey citizenship to the child absent legitimation.

The gender-based distinctions in § 1409 – recognized by the State Department since at least 1912 and first codified in 1940 – are based on this discriminatory framework. The Nationality Act of 1940 ("1940 Act") was a comprehensive codification and revision of all existing immigration, naturalization, and citizenship laws and administrative practices.[17] The legislative history of § 205 of the 1940 Act, the predecessor of § 1409, while not extensive, does not indicate that the different treatment of unwed citizen fathers and mothers was based on any of the justifications currently offered for this provision. Rather, it was based on the constructs of the common law, and even

[16] *See also Collins, supra*, at 1688-93 and sources cited.

[17] President Roosevelt appointed a Committee of Advisors comprised of members of the Department of State, Department of Labor, and the Attorney General's Office [hereinafter Committee of Advisors] "to study the existing laws governing nationality, and to prepare a draft code embodying such changes and additions as might seem desirable, together with a report explaining the issues." *1940 Hearings* at 235 (Message to the President of the United States from Secretary of State Cordell Hull, Attorney General Homer Cummings, and Secretary of Labor Frances Perkins) [hereinafter Message to the President]. That Committee prepared a codification proposal with extended commentary [hereinafter Proposed Code] which was presented to the President and was transmitted to the Congress by the President on June 13, 1938. *See id.*

earlier traditions, that defined distinct roles and responsibilities for men and women with respect to their out-of-wedlock children.

In the comments submitted with the Proposed Code regarding § 205 of the 1940 Act, the Committee of Advisors' position on the transmission of citizenship to foreign-born children through the unwed citizen mother was justified as follows:

> [I]t may be said that the Department of State has, at least since 1912, uniformly held that an illegitimate child born abroad of an American mother acquires at birth the nationality of the mother, in the absence of legitimation or adjudication establishing the paternity of the child. This ruling is based upon section 1993 of the Revised Statutes, that section being construed to apply to an illegitimate child born abroad of an American mother, on the ground that the mother in such a case stands in the place of the father. . . . [U]nder American law the mother "has a right to the custody and control of such a child as against the putative father, and is bound to maintain it as its natural guardian." This rule seems to be in accord with the old Roman law and with the laws of Spain and France. So, in *Corpus Juris*, it is said: "the mother, as guardian by nature, has the right to the custody and control of her bastard child until it attains an age when it can, in contemplation of the law, make an election between father and mother."

1940 Hearings at 431 (Proposed Code with Explanatory Comments) (citations omitted). In connection with § 205 of the 1940 Act, there was no discussion of any

justification other than traditional rules defining the different responsibilities and rights of unwed mothers and fathers.[18]

As ultimately enacted, § 205 of the 1940 Act, ch. 876, 54 Stat. 1137, 1139-40 (1940), provided that nonmarital children born abroad would derive citizenship from their father if they were legitimated, generally under the local law of the place of birth. In the absence of legitimation, the child would inherit citizenship from the mother if she were a citizen at the time of the child's birth and had previously resided in the United States.

The 1940 provisions thus reinforced the gender-based assignment of rights and responsibilities for out-of-wedlock children. Those gender-based common law principles have been abandoned in state law; noncustodial parents, fathers and mothers, now have equal responsibilities to provide child support to their children. *See, e.g.*, Tex. Fam. Code Ann. § 154.001 (1996); N.Y. Fam. Ct. Act § 413 (1999); Cal. Fam. Code § 3900 (1994); Conn. Gen. Stat. Ann. § 46b-84 (1995); Del. Code Ann. tit. 13 § 501 (1999); Fla. Stat. ch. 61.13 (1997); Ariz. Rev. Stat. § 25-501 (1999); Mass. Gen. Laws Ann. ch. 208 § 28 (1998). But these discredited common law stereotypes became embedded in the law governing the citizenship of out-of-wedlock children.

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[18] In relation to different provisions of the 1940 Act, but not § 205, concerns about the ties between the United States and children born abroad whose fathers were nationals of those countries were expressed. *See* Section III.C., *infra*.

B. The 1986 Amendments to § 1409 Were Intended to Maintain the Discriminatory Common Law Framework and Make It Easier to Administer.

The substance of the provision that is now § 1409(a) remained largely unchanged from 1940 to 1986.[19] The 1986 amendments made procedural changes in the way fathers could convey citizenship to their out-of-wedlock children, but Congress accepted as a given that the rules for fathers and mothers would be different, as they had been under common law and the original 1940 version of the provision.

An examination of the legislative history reveals that, when Congress amended the Immigration and Nationality Act ("INA") in 1986, at the request of the State Department, the primary purpose was to promote more efficient administration of the statute. *Administration of the Immigration and Nationality Laws: Hearings on H.R. 4827, H.R. 4444, and H.R. 2184 Before the Subcomm. on Immigration, Refugees, and Int'l Law of the House Comm. on the Judiciary*, 99th Cong. 131 (1987) [hereinafter *1986 Hearings*] (statement of Joan Clark, Assistant Secretary of State for Consular Affairs) ("The provisions of this bill [we]re designed to streamline procedures and reduce the paperwork required to deliver consular services."). While there were extensive hearings

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[19] In its briefs below, the Government confirms that "Section 205 of the Nationality Act of 1940 was the substantively identical predecessor of [Section 1409(a)]." Respondent's Br. at 32. In 1952, the provision of former Section 205 that permitted unwed citizen mothers to transmit citizenship to their foreign-born children only if they had not been legitimated or their paternity established was eliminated and § 205 of the 1940 Act was recodified as § 1409. Section 1409 was not amended again until 1981, when § 1409's references to § 1401 were made to conform to the renumbering of that section.

on H.R. 4444 along with H.R. 4827, 2184, and other measures designed to improve the administration of the INA, Assistant Secretary Clark's written statement in support of the § 1409 changes contains the only substantive discussion about them. Her statement describes the purposes of these changes as follows:

> Section 13(b) [of the proposed amendment] amends section 309(a) of the Act to permit an illegitimate child of an American citizen father to acquire U.S. citizenship based on the father's formal written acknowledgment of paternity, or a court adjudication of paternity. This proposal would simplify and facilitate determinations of acquisition of citizenship by children born out of wedlock, to an American citizen father, by eliminating the necessity of determining the father's residence or domicile and establishing satisfaction of the legitimation provisions of the jurisdiction. To deter fraudulent claims, however, the fact that a blood relationship exists between the U.S. citizen father and the child would have to be shown by clear and convincing evidence. Moreover, the child's father, if living, must agree to provide for the child's financial support. The purpose of this clause is to facilitate the enforcement of a child support order and, thus, lessen the chance that the child could become a financial burden to the states.

1986 Hearings at 150. Assistant Secretary Clark's statement was incorporated into the record, and the Subcommittee on Immigration, Refugees and International Law – and later the full Judiciary Committee – recommended passage of the Department's proposed

changes to § 1409 *in toto,* without further discussion. *See* H.R. Rep. No. 99-916 (1986).

It thus appears from this scant legislative history of the specific changes to § 1409 that the State Department proposed, and Congress agreed, to maintain the basic gender-based framework of the provision, but wanted to provide a simpler alternative to the legitimation requirement, which required consular knowledge of the complex and varied rules concerning legitimation in different jurisdictions. Under the State Department's proposal, which became § 1409(a)(4), the requirement could be satisfied by acknowledging paternity in writing under oath while a child was under 18, as well as by legitimation or adjudication of paternity.

To ensure that this new way of satisfying the legitimation requirement would not lead to fraudulent claims, however, the State Department proposed adding a requirement, which became § 1409(a)(1), that the biological relationship between the father and child be proved by clear and convincing evidence. There is no discussion in the legislative history of what purpose would be served by maintaining a requirement that unwed fathers acknowledge, legitimate, or secure a court determination of the paternity of their children once a demonstration of the relationship by "clear and convincing evidence" was required. *See* Section IV.B, *infra*. The Department also proposed adding a requirement, which became § 1409(a)(3), requiring an unwed father to sign a statement agreeing to support the child until age 18 to lessen the chance that the child would become a public charge. *See* Section IV.A, *infra*. There is no legislative history indicating a basis for concern about the out-of-wedlock children of citizen fathers, but not those of citizen mothers, becoming a public charge since common law distinctions between the child support responsibilities of fathers and

mothers for their out-of-wedlock children had been eliminated, and a duty of both parents to support established, *see* Section II.A, *supra*. Finally, there is nothing in the legislative history of the changes to § 1409 indicating that there was any interest by the State Department or the Congress in promoting relationships between unwed citizen fathers and their foreign-born children or between those children and the United States. Thus, the persistent gender-based approach to pursuing these objectives is simply based on the outmoded stereotypes of the common law.

C. The Purported Objectives of Encouraging Relationships Between Father and Child, and Between the Child and the United States, Are Post-Hoc Rationalizations.

The Government has presented several justifications for the discriminatory provisions of § 1409. The objectives of preventing fraud and preventing a child from becoming a public charge are mentioned in the legislative history; however, the gender-based approach taken in these statutory provisions is rooted in common law stereotypes, *see* Sections II and III.A, *supra*, and is not substantially related to achieving these objectives, *see* Section IV, *infra*. Moreover, the purported objectives of encouraging relationships between fathers and children, and between children and the United States appear to have been "invented post hoc in response to litigation." *VMI* at 533.

In this case, in its brief below, the Government has referred generally to the history of the 1940 Act in an effort to justify § 1409 as designed to promote "close family ties" and to prevent "complete strangers to the United States becoming citizens by virtue of their parentage." Respondent's Br. at 32. However, nowhere in the legislative history of the 1940 Act is this concern expressed in relation to § 205, the predecessor of § 1409.

In drafting the proposed code, the Committee of Advisors generally recognized the possibility that "persons born in foreign countries whose fathers were nationals of those countries would be likely to have stronger ties with the foreign country than with the United States." *1940 Hearings* at 237. However, this concern was addressed directly by § 201(g) of the 1940 Act, which imposed, as a condition of retaining citizenship, a requirement that children reside in the United States for a period of time. *Id.*[20]

Similarly, the legislative history of the 1986 amendments to § 1409 makes no mention of the goal of promoting an on-going relationship between unwed fathers and their foreign-born children. Reference to this goal is made in relation to a different provision of the INA that is unrelated to § 1409. In seeking a change to § 101 of the Act, a representative of the Immigration and Naturalization Service explicitly stated that the establishment of an on-going relationship between a father and his child was of concern in determining which children should be eligible to receive immigrant visas, which are limited in number. *See 1986 Hearings* at 120 (statement of Richard E. Norton, Associate Commissioner, Examinations, U.S. Immigration and Naturalization Service) ("where no relationship other than the biological one exists, we perceive no cause to provide a benefit not demanded by normal considerations of family reunification."). In contrast to immigrant visas for noncitizens, there is no limitation on the number of individuals for whom citizenship may be transmitted under § 1409.

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[20] This requirement was repealed in 1978. Pub. L. No. 95-432 § 1, 92 Stat. 1046 (1978).

In sum, there is no indication in the legislative history that §§ 1409(a)(3) and (a)(4) were intended to promote healthy parent-child relationships or ties between the foreign-born and the United States. Therefore, while the promotion of such relationships may indeed apply as a justification to other sections of the INA, it is not a justification, much less an exceedingly persuasive justification, for the gender-based provisions of §§ 1409(a)(3) and (4).

IV. SECTIONS 1409(a)(3) AND (a)(4) ARE NOT SUBSTANTIALLY RELATED TO THE ASSERTED GOVERNMENT OBJECTIVES OF ENSURING THAT A FOREIGN-BORN, OUT-OF-WEDLOCK CHILD DOES NOT BECOME A PUBLIC CHARGE OR DETERRING FRAUDULENT CLAIMS OF PATERNITY.

The Government and the court below assert two additional objectives for the gender-based requirements of §§ 1409(a)(3) and (a)(4), both of which have some support in the legislative history. The first objective is to secure child support for a foreign-born, out-of-wedlock child to ensure that the child does not become a public charge, and the second is to deter fraudulent claims of paternity that wrongfully confer citizenship. Sections 1409(a)(3) and (a)(4) are not substantially related to either of these objectives.

A. Sections 1409(a)(3) and (a)(4) Are Not Substantially Related to the Governmental Objective of Ensuring that a Foreign-Born, Out-of-Wedlock Child Does Not Become a Public Charge.

The laws of all the states establish procedures under which either custodial mothers or fathers, on a gender-

neutral basis, may seek legally enforceable support from the noncustodial parents of their out-of-wedlock children.[21] Sections 1409(a)(3) and (a)(4) are insufficiently related to securing legally enforceable support under these laws to provide any meaningful protection against a child's becoming a public charge. Moreover, there is no valid basis for assuming that the children of unwed citizen fathers but not mothers need support to keep them from becoming a public charge. *See* Section II, *supra*.

Under the laws of all the states, the first step in securing legally enforceable support for a child born out-of-wedlock is to establish paternity, which can be done through a court or agency determination, *see* 42 U.S.C. §§ 654(20)(A), 666(a)(5)(A), or by a written statement under oath that is signed by both the child's father and the child's mother, *see* 42 U.S.C. §§ 666(a)(5)(C) & (D)(ii), (iii); U.S. Department of Health and Human Services, Office of Child Support Enforcement, A.T. 98-02, *available at* http://www.acf.dhss.gov/programs/cse/pol/at-9802.htm. If a mother or putative father does not wish to acknowledge paternity voluntarily, the use of genetic

[21] Section 402(a)(2) of the Social Security Act, 42 U.S.C. § 602(a)(2), requires states, as a condition of receiving federal funding under the Temporary Assistance to Needy Families program, to establish a program that complies with Title IV-D of the Act, 42 U.S.C. § 654 *et seq.*, under which individuals may obtain assistance, on a gender-neutral basis, in establishing paternity and enforcing child support. All of the states have IV-D programs, which are administered by the states but whose major design features, including specific procedures for establishing and enforcing support that must be included in state law, 42 U.S.C. § 666, are dictated by the federal government. *See 1996 Green Book: Background Material and Data on Programs Within the Jurisdiction of the Comm. on Ways and Means*, House Comm. on Ways and Means, 104th Cong. 530 (1996). *See also* Section II.A, *supra* (states have abandoned the common law's gender-based assignment of support obligations).

testing is encouraged,[22] and the results of genetic testing are treated as a rebuttable or conclusive – depending on the state – presumption of paternity. *See* 42 U.S.C. § 666(a)(5)(G). A custodial parent may obtain an order for temporary support from the other parent, pending an administrative or judicial determination of parentage, if there is "clear and convincing evidence of paternity." *See* 42 U.S.C. § 666(a)(5)(J). Once paternity has been administratively or judicially determined, a custodial parent may seek a permanent order of child support from the other parent, which must be expressed in a specific numeric amount. *See* 42 U.S.C. § 667; 45 C.F.R. § 302.56(c)(2). Once entered, this order may be enforced through wage withholding, the imposition of liens, and other remedies such as driver's license revocation. *See* 42 U.S.C. §§ 666(a)(1) & (b), (a)(4), (a)(16).

Section 1409(a)(3) merely requires a father to agree in writing to support his child until age 18. For this agreement to be converted into a legally enforceable support obligation, it would have to be incorporated into an administrative or court order that includes a specified amount of support, numerically expressed, and otherwise meets the requirements of the law of the state in which support is being sought.[23] Only at that point could the resulting order be enforced by wage withholding, contempt or other remedies available to compel nonpayment of support. In short, an individual or governmental agency

[22] In a contested case, genetic testing must be available at the request of either party. *See* 42 U.S.C. § 666(a)(5)(B)(i).

[23] It is clear from the INS affidavit required of citizen fathers of foreign-born, out-of-wedlock children that no numeric amount of support is included. *See* U.S. Department of State, *Affidavit of Parentage and Physical Presence*, *available at* http://travel.state.gov/physpres.html (last visited Nov. 9, 2000). It is equally clear that it does not constitute an administrative or court order of support. *See id.*

seeking to secure the support promised under the agreement required by § 1409(a)(3) would have to proceed essentially no differently than if § 1409(a)(3) did not exist.

Section 1409(a)(4) does not make it any easier to secure legally enforceable child support. It is satisfied simply by a father's acknowledgment of paternity in writing under oath.[24] For this acknowledgment to be converted into a voluntary acknowledgment of paternity valid under state law, the mother would have to agree that the individual in question is the child's father and add her signature to that of the father's. Absent her signature, an administrative or court order of paternity would be necessary to secure a child support order.

Clearly, neither § 1409(a)(3) nor (a)(4) is substantially related to the governmental objective of securing the support necessary to prevent a child from become a public charge. Moreover, §§ 1409(a)(3) and (a)(4) are superfluous, because § 1409(a)(1) provides a much more effective way of securing legally enforceable support. The mere establishment under § 1409(a)(1) of a blood relationship between an unwed citizen father and the child by clear and convincing evidence is a sufficient basis for obtaining a temporary, enforceable child support order in all the states. *See* 42 U.S.C. § 666(a)(5)(J). Furthermore, it is easy to establish clear and convincing evidence of paternity by genetic testing using DNA

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[24] There are three ways to meet § 1409(a)(4)'s requirements: legitimation under the law of the child's domicile or residence, adjudication of the child's paternity by a competent court, or acknowledgment of the child's paternity by the father in writing under oath. Since the language is disjunctive, a father can meet § 1409(a)(1)'s requirement simply by written acknowledgment.

analysis.[25] A genetic test also can create a rebuttable or conclusive presumption of paternity, depending on the state, upon which paternity can be established definitively in a court or administrative proceeding, *see* 42 U.S.C. § 666(a)(5)(G), allowing a permanent child support order to be entered.

B. Sections 1409(a)(3) and (a)(4) Are Not Substantially Related to the Governmental Objective of Deterring Fraud.

Because §§ 1409(a)(3) and (4) are insufficiently related to securing legally enforceable support, they also do not provide any meaningful deterrent to the assertion of false claims of paternity. A putative father who incurs no enforceable financial obligation is not likely to be deterred from asserting that he is the father of a child in order to confer citizenship.

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[25] Paternity can be determined by a DNA test with 99.99 percent certainty. *See* E. Donald Shapiro et al., *The DNA Paternity Test: Legislating the Future Paternity Action*, 7 J.L. & Health 1, 29 (1992-1993); U.S. Department of Health and Human Services, Office of the Inspector General, *Paternity Establishment: State Use of Genetic Testing* 1 (September 1999) [hereinafter *Paternity Establishment*]. Recent developments in technology have made genetic tests relatively inexpensive as well as minimally physically intrusive and widely available. *See* Aviam Soifer & Miriam Wugmeister, *Mapping and Matching DNA: Several Legal Complications of "Accurate" Classifications*, 22 Hastings Const. L.Q. 1, 22 (1994). While earlier DNA profiling required blood testing, today buccal (mouth or cheek cavity) swabs are an alternative to drawing blood for testing. *See Paternity Establishment* at 9. Genetic testing "can be an extremely valuable tool in cases when it otherwise would be impossible to verify a relationship." *INS Memorandum on DNA Testing to Establish Family Relationships* 2 (July 14, 2000), *available at* http://www.immigrationlinks.com/news/news 413.htm. Of course the fact that a genetic test readily provides clear and convincing evidence of a biological relationship between a parent and his child does not mean that such a test is the only way to show the biological tie.

Indeed, it was for this reason that the State Department proposed, and Congress included in the statute, § 1409(a)(1)'s requirement that a father prove a blood relationship to the child by clear and convincing evidence. *See* Section II.B, *supra*. This legislative history of §1409 confirms that § 1409(a)(1), not § 1409 (a)(3) or (a)(4), was expressly intended to deter fraud. Moreover, with readily available DNA testing, which can be performed at any time, the additional requirement under §§ 1409(a)(3) and (4) that action be taken before the child is 18 and evidence becomes stale is not necessary to prevent fraudulent claims of paternity. *See* note 25, *supra*. In sum, because §§ 1409(a)(3) and (4)'s gender-based requirements are insufficiently related to the governmental objectives of preventing out-of-wedlock children from becoming a public charge or deterring fraudulent claims of paternity to confer citizenship, as well as superfluous to §§ 1409(a)(1) in achieving those objectives, they cannot survive heightened scrutiny.

CONCLUSION

For the reasons set forth above, and in the Brief of the Petitioners, the decision below should be reversed.

Respectfully submitted,

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November 13, 2000

APPENDIX

Statements of Interest

National Women's Law Center

The National Women's Law Center ("Center") is a non-profit legal organization that has worked since 1972 to advance and protect women's rights. The Center focuses on major areas of importance to women and their families, including income security, employment, education, and reproductive rights and health -- with special attention to the needs of low-income women. The Center has provided assistance or participated as counsel or *amicus curiae* in a range of cases to secure the equal treatment of women under the law.

Association for Children for Enforcement of Support, Inc.

The Association for Children for Enforcement of Support, Inc. ("ACES") is a national non-profit child support advocacy group of parents whose children are entitled to support. ACES is committed to improving child support enforcement and assuring that child support issues are addressed in a fair and equitable manner.

Centers on Fathers, Families and Public Policy

The Center on Fathers, Families and Public Policy ("CFFPP") is a nationally-focused, non-profit, public policy organization that specializes in policy research, technical assistance, training and public education in order to focus attention on the barriers faced by never-married, low-income fathers and their families. CFFPP was established in 1995, and has tax-exempt status under federal and state laws. CFFPP has a strong interest in upholding equal rights for all members of society.

Equal Rights Advocates

Equal Rights Advocates ("ERA") is one of the oldest public interest law firms specializing in litigation and advocacy efforts to eliminate gender discrimination and secure equal rights. ERA has a long history of interest, activism, and advocacy in many areas of the law that affect equality between the sexes, including pay equity, sexual harassment in the workplace and schools, pregnancy discrimination, and affirmative action. ERA's work includes issues affecting immigrant women in the workplace, as well as under state and federal public benefit programs.

Harriet Buhai Center for Family Law

The Harriet Buhai Center for Family Law ("Buhai Center") is a non-profit legal aid agency serving low-income persons in Los Angeles County. The Buhai Center provides family law and domestic violence assistance to over 1,000 indigent adults and several thousand of their children each year, primarily in the areas of custody, visitation, child support, domestic violence, divorce and paternity establishment. The Buhai Center's work includes representation of the interests of individuals seeking citizenship who are directly affected by the provisions of 8 U.S.C. § 1409.

National Center on Poverty Law

The National Center on Poverty Law ("Center on Poverty Law") is a non-profit public interest law firm whose mission is to provide leadership in identifying, developing and supporting creative and collaborative approaches to achieving social and economic justice for low-income people. The Center on Poverty Law represents low-income people on welfare, workforce, housing and community development issues and manages communication and knowledge services on poverty law and policy. The Center on Poverty Law has a long history in Illinois and the rest of the country of challenging the unequal treatment of the children of unmarried parents as well as the discrimination and other barriers that low-income, unmarried fathers face in their attempts to support and nurture their children.

National Partnership for Women & Families

The National Partnership for Women & Families ("National Partnership") is a national advocacy organization that develops and promotes policies to help women achieve equal opportunity, quality health care, and economic security for themselves and their families. Since its founding in 1971, the National Partnership (formerly the Women's Legal Defense Fund) has worked to advance equal protection under law on the basis of gender through litigation of significant cases, public education, and advocacy.

Northwest Women's Law Center

The Northwest Women's Law Center ("NWLC") is a non-profit public interest organization that works to advance the legal rights of all women through litigation, education, legislation and the provision of legal information and referral services. Since its founding in 1978, the NWLC has been dedicated to protecting and expanding women's civil rights and securing gender equality. Toward this end, the NWLC has participated as counsel and as *amicus curiae* in cases throughout the Northwest and the country, to ensure that women and men have the ability to participate equally in all aspects of life.

Texas Civil Rights Project

The Texas Civil Rights Project ("TCRP"), founded in 1990, is a non-profit public interest law organization that promotes racial, economic, and social justice, as well as civil

liberties under the Bill of Rights of the Texas and United States Constitutions. TCRP works to ensure that individuals' civil rights and civil liberties under the state and federal constitutions are not abridged or modified, whether through legislation, improper enforcement or judicial action.

Women's Law Project

The Women's Law Project ("Law Project") is a Philadelphia-based public interest organization dedicated to challenging gender discrimination and securing equal rights for women and men through litigation, public policy development, public education and individual counseling. Since its founding in 1974, the Law Project has vigorously advocated for gender equity in a wide variety of areas, including employment, education, insurance, and family law under state and federal constitutional and statutory guarantees of equal treatment.

Women Lawyers Association of Los Angeles

Women Lawyers Association of Los Angeles ("WLALA") is a non-profit organization comprised primarily of attorneys and judges in Los Angeles County. Founded in 1919, WLALA is dedicated to promoting the full participation of women lawyers and judges in the legal profession, maintaining the integrity of our legal system by advocating principles of fairness and equality, and improving the status of women in our society. To further these goals, WLALA has joined *amicus* briefs in cases before this Court having a significant impact on women's rights, including challenges to laws founded on overbroad generalizations about the differential talents, capacities, or preferences of males and females.

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No. 99-2071

IN THE

Supreme Court of the United States

TUAN AHN NGUYEN AND JOSEPH BOULAIS,
Petitioners,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit

BRIEF OF EQUALITY NOW AND OTHERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI[1]

Equality Now is an international human rights organization dedicated to the protection and promotion of women's rights. Human rights principles articulated in international law reinforce the work of the organization. Equality Now has consultative status with the United Nations and regularly submits information to the United Nations Human Rights Committee on implementation of the International Covenant on Civil and Political Rights in countries under review by the Committee with respect to equality and other rights relating to the status of women.

In July 1999, in preparation for the June 2000 Special Session of the United Nations General Assembly to review implementation of the Platform for Action adopted in 1995 at the Fourth World Conference on Women in Beijing, Equality Now issued a report, *Words and Deeds - Holding Governments Accountable in the Beijing +5 Review Process*, highlighting a representative sampling of laws in 45 countries around the world that explicitly discriminate on the basis of sex.

One of the discriminatory laws highlighted in this report was Section 309 of the Immigration and Nationality Act (INA), ch. 477, 66 Stat. 238 (1952), *as amended*, 8 U.S.C. § 1409. Equality Now has continued its efforts to get 8 U.S.C. 1409(a)(3) and (a)(4) amended in accordance with the commitment made by the United States Government, together with other

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[1] The parties have consented to the submission of this brief. The letters of consent have been filed with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part. With the exception of the Urgent Action Fund (P.O. Box 29274, Presidio Building 1016, San Francisco, CA 94129-0274) which supported research for the brief, and no one other than amici's counsel contributed money or services to preparation or submission of this brief.

governments, in ¶232(d) of the Platform for Action, Report of the Fourth World Conference on Women, Beijing, Sept. 4-15 1995, U.N. Doc. A/CONF.177/20, resolution I, Annex II, to revoke laws that discriminate on the basis of sex. Members of Equality Now's Women's Action Network, consisting of more than 5,000 groups and individuals in more than 100 countries around the world including the United States, have written to United States government officials, urging them to work for the adoption of the same legal standard, based on equality, for U.S. citizen fathers and mothers to transmit citizenship to their children born abroad and out-of-wedlock.

Argentine Association of Women Judges (AMJA) was initially founded in 1993 as a chapter of the International Association of Women Judges. In 1997, it became an independent association. The AMJA is based in Buenos Aires and has 280 members around the country including men as well as women and prosecutors and public defenders, as well as judges. Since 1994, the AMJA has run a judicial education program based on international law and entitled "Towards a Jurisprudence of Equality: Women, Judges and Human Rights Laws."

Ethiopian Women Lawyers Association (EWLA) is a non-governmental organization based in Addis Ababa, working for the protection and promotion of women's rights in Ethiopia. The organization is engaged in various legislative initiatives, particularly in relation to family law and laws relating to violence against women. The organization is also engaged in the provision of legal services to women, and in broader educational initiatives for the promotion of legal literacy among women in Ethiopia.

Forum for Women, Law and Development (FWLD) is a non-governmental organization based in Kathmandu, Nepal, working for the advancement of

women's rights in Nepal. FWLD has been involved in a number of test cases on equality issues incorporating the use of international law in domestic courts in Nepal. In June 1999, FWLD submitted a shadow report on the implementation by Nepal of its obligations under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), in connection with a review of Nepal by the United Nations CEDAW Committee. FWLD recently issued a report, "Discriminatory Laws in Nepal and Their Impact on Women: A Review of the Current Situation and Proposals for Change."

International Commission of Jurists (ICJ) is an international non-governmental organization founded in 1952 and based in Geneva. Its global goal is to support and advance those principles of justice which constitute the basis of the rule of law and assist those people to whom the rule of law is denied. The ICJ has consultative status with the United Nations, the Organization of African Unity, and the Council of Europe.

International Federation of Women Jurists (FIFCJ) is a non-governmental organization that was founded in 1926. It is based in Barcelona, Spain and has members from 72 countries. Members include lawyers, judges, and law professors, and the organization engages in activities around the world, particularly in Europe, South America and Africa. FIFCJ has consultative status with the United Nations and has participated in the development of international law including the Convention on the Elimination of All Forms of Discrimination (CEDAW) and other conventions and norms of the European Union.

International Federation of Women Lawyers (FIDA) is a non-governmental organization, founded in 1944 in Mexico City. FIDA, which has consultative status with the United Nations, aims to promote the

principles of the United Nations especially by advancing opportunities for women, particularly in the legal and judicial professions. FIDA is a worldwide organization with members in 80 countries. Members include practicing lawyers, jurists, government ministers, and community leaders.

International Human Rights Law Group is a non-profit organization of human rights and legal professionals based in Washington, D.C. with offices in several countries engaged in human rights advocacy, litigation and training around the world. The International Human Rights Law Group helps empower local advocates to expand the scope of human rights protections for men and women and to promote broad participation in building human rights standards and procedures at the national, regional and international levels.

International Women's Rights Action Watch (IWRAW) was founded in 1985 and is based at the Humphrey Institute, University of Minnesota. IWRAW is a resource and communication center for an international network of 5000 activists, scholars, and government officials focusing on implementation of women's human rights under the UN human rights treaties. It produces shadow reports on the status of women in countries under review by United Nations treaty bodies including CEDAW and provides technical assistance on treaty implementation.

Latin American and Caribbean Committee for the Defense of Women's Rights (CLADEM) is a non-governmental organization based in Lima, Peru with affiliates in seventeen countries, working to end violence and promote the human rights of women. In October 2000, CLADEM coordinated the submission of reports to the United Nations Human Rights Committee on the implementation of the International Covenant on Civil and Political Rights by Argentina and Peru, in connection with the Committee's review of those countries.

Women in Law and Development in Africa (WiLDAF) is a pan-African non-governmental organization working to bring together organizations and individuals using law to promote and protect women's rights in African countries. WiLDAF's goal is to promote the effective use of legal strategies by women in Africa for self, community and national development. The organization, which was established in 1990, has chapters in 33 countries of Africa. The Regional Office is based in Harare, Zimbabwe.

TABLE OF CONTENTS

	PAGE
INTEREST OF THE AMICI	i
TABLE OF AUTHORITIES	viii
STATEMENT OF FACTS AND PROCEDURAL HISTORY	1
SUMMARY OF THE ARGUMENT	1
ARGUMENT	4
I. THE COURT SHOULD CONSIDER THE CONSTITUTIONALITY OF 8 U.S.C. § 1409 WITH REFERENCE TO THE EQUALITY RIGHT SET FORTH IN THE UNITED NATIONS INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)	4
A. Treaties Have the Force of Law under the Constitution and the Court Has Relied on Treaty Law in its Jurisprudence, Particularly in the Context of Immigration	4
B. The ICCPR, as a Treaty in Force, Can and Should Be Used in Interpreting the Constitution	5
C. The ICCPR Supports a Finding That Sex Discrimination in the Transmission of Citizenship Violates the Right to Equality Before the Law and Equal Protection of the Law	8
D. No Legitimate Governmental Objective Is Served by the Embodiment in Law of Stereotypical Sex-based Assumptions about Parenting	12
II. THE COURT SHOULD CONSIDER THE CONSTITUTIONALITY OF 8 U.S.C. § 1409 WITH REFERENCE TO CUSTOMARY INTERNATIONAL LAW	14
A. Courts Have Relied on Customary International Law as Part of Domestic Law	14
B. Sex Discrimination in the Transmission of Citizenship Is Contrary to an Emerging Norm of Customary International Law	16
III. THE UNITED STATES SUPREME COURT IS A MODEL FOR OTHER COUNTRIES AND SHOULD PLAY A LEADING ROLE IN THE ESTABLISHMENT AND PROMOTION OF INTERNATIONAL HUMAN RIGHTS LAW	24
A. High Courts Around the World Look to the Jurisprudence of the United States Supreme Court for Guidance on Matters of Human Rights	24
B. By Referencing International Law in its Judgment, the Court Can Support High Courts in Other Countries in Their Efforts to Promote Human Rights and the Rule of Law	26
CONCLUSION	29

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PAGE

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PAGE

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IN THE

Supreme Court of the United States

No. 99-2071

TUAN AHN NGUYEN AND JOSEPH BOULAIS,
Petitioners,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit

BRIEF OF EQUALITY NOW AND OTHERS AS
AMICI CURIAE IN SUPPORT OF PETITIONERS

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Equality Now relies on the statement of facts and procedural history set out in Petitioners' Brief.

SUMMARY OF THE ARGUMENT

Equality Now brings to the attention of the Court the importance of considering international human rights law in its review of the constitutionality of 8 U.S.C. § 1409, the law that governs the transmission of citizenship to children born overseas and out-of-wedlock. This law sets forth, in addition to the establish-

ment of paternity, other requirements for U.S. citizen fathers to transmit citizenship to their children born overseas and out-of-wedlock, including a written undertaking to provide financial support, which are not applicable to similarly situated U.S. citizen mothers.

The United States Supreme Court is a model for countries around the world and should play a leading role in the interpretation and application of international law. High courts in other countries have historically looked to the jurisprudence of the Court for guidance, and the United States Government has frequently declared the importance of international law and the promotion of human rights. Particularly in the context of immigration law, the Court has looked to and cited international law.

Under Article VI of the Constitution, all treaties made under the authority of the United States "shall be the supreme Law of the Land." Following its ratification by the United States of the International Covenant on Civil and Political Rights ("ICCPR") in 1992, the ICCPR constitutes a legitimate and important source of legal authority pursuant to Article VI of the Constitution. The ICCPR can and should be drawn upon by the Court in support of constitutional law arguments on issues of fundamental human rights such as the right to equality between men and women, which is at issue in this case. The ICCPR specifically enumerates sex as one of the impermissible grounds of discrimination from which all persons should be protected.

In ratifying the ICCPR, the United States articulated the understanding that sex-based distinctions are permitted if rationally related to a legitimate government objective. In reviewing the legitimacy of governmental objectives served by the sex-based distinctions set forth in 8 U.S.C. § 1409, the Court should consider the growing international as well as national recogni-

tion that such distinctions between fathers and mothers are incompatible with the equal sharing of parental responsibility and serve to entrench stereotypes that absolve men of this responsibility. In this conceptual framework, no legitimate governmental objective is served by formalizing in law traditional stereotypical assumptions about parenting based on the sex of the parent.

Under customary international law, recognition of the right to equality before the law and equal protection of the law provides additional authority for the argument that sex-based distinctions in the right of parents to transmit citizenship to their children, as set forth in 8 U.S.C. § 1409, are unconstitutional. Customary international law has long been recognized as legal authority under U.S. law. Sources of customary international law including treaties, legislative developments around the world and case law in international as well as national jurisdictions all indicate an emerging recognition of the right to equality between men and women in the transmission of citizenship to their children.

International law strongly supports the constitutional law arguments of the petitioners in this case against the constitutionality of 8 U.S.C. § 1409. A finding of the unconstitutionality of 8 U.S.C. § 1409 with reference to international law would be a timely and valuable contribution to the efforts of other high courts around the world to uphold the rule of law and promote the fundamental human rights in which the Constitution and international law are grounded. It would also reinforce the obligation of other nations to change their discriminatory nationality and citizenship laws in favor of granting mothers and fathers the equal right to confer citizenship on their children.

ARGUMENT

I. THE COURT SHOULD CONSIDER THE CONSTITUTIONALITY OF 8 U.S.C. § 1409 WITH REFERENCE TO THE EQUALITY RIGHT SET FORTH IN THE UNITED NATIONS INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)

A. Treaties Have the Force of Law under the Constitution and the Court Has Relied on Treaty Law in its Jurisprudence, Particularly in the Context of Immigration.

The United States Constitution, Article VI, clause 2 ("the Supremacy Clause") provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. . . .

The status of treaties under the U.S. Constitution has long been recognized by the Court. In 1888, Justice Field noted, the Federal Rules and treaties are both "supreme law of the land, and no superior efficacy is given to either over the other." Whitney v. Robertson, 124 U.S. 190, 194 (1888) *See also Foster v. Neilson*, 27 U.S. 253 (1829), *Ware v. Hylton*, 3 U.S. 199 (1796), *Edye v. Robertson*, 112 U.S. 580, 598-99(1884), *Pollard's Heirs v. Kibbe*, 39 U.S. 353, 415 (1840), *Owings v. Norwood's Lessee*, 9 U.S. 344, 348-49 (1809), *Laker Airways, Ltd. v. Pan American World Airways*, 103 F.R.D. 42 (D.D.C. 1984), *Color Sys., Inc. v. Meteor Photo Reprographic Sys., Inc.*, No. Civ. A. 86-2516, 1987 WL 11085 (D.D.C May 8, 1987). More recently, the Ninth Circuit has affirmed that it is the role of the judiciary "to interpret international treaties and to

enforce domestic rights arising from them." *United States v. Decker*, 600 F.2d 733, 737 (9th Cir. 1979).

Particularly in the context of interpreting the Immigration and Nationality Act, the Court has considered and cited international law in its jurisprudence. Immigration law is an area of convergence of U.S. law and international law as often there is a need to ensure coordination among States in such areas as prevention of statelessness, the facilitation of migration and the assurance of border controls. The United Nations Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267, 19 U.S.T. 6223 (*entry into force*, Dec. 4, 1967), was ratified by the United States in 1968. Although implementing legislation was passed to incorporate the terms of the treaty in domestic law, the Court has looked to this underlying treaty for guidance in interpreting the law. In *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 436-40 (1987), for example, when distinguishing between the "well founded fear" and "clear probability" standards for aliens seeking asylum or withholding from deportation, the Court examined the definition of "refugee" in the Convention on the Status of Refugees as incorporated in the Protocol to determine its meaning under the 1980 Refugee Act, 94 Stat. 102, the implementing legislation. In *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415 (1999), not only did the Court examine provisions of this treaty, the Court even cited the Office of the United Nations High Commissioner for Refugees' Handbook on Procedures and Criteria for Defining Refugees (Geneva 1979) as "a useful interpretive aide." *Id.* at 426.

B. The ICCPR, as a Treaty in Force, Can and Should Be Used in Interpreting the Constitution.

The United States ratified the International Covenant on Civil and Political Rights, *adopted and opened for signature*, Dec. 16, 1966, 999 U.N.T.S. 171 (*entry*

into force 23 Mar. 1976), on June 8, 1992. The U.S. transmittal of its ratification to the United Nations set forth a number of reservations, understandings and declarations designed to ensure consistency between U.S. law and the treaty as ratified.[2] The reservations address freedom of expression, capital punishment, the treatment of juveniles in the criminal justice system, and other areas of law in which the treaty's provisions are limited by the scope of the United States Constitution. The understandings similarly conform provisions of the treaty to U.S. law. The declarations include a declaration that "the provisions of articles 1 through 27 of the ICCPR are not self-executing." 138 Cong. Rec S4781-01, at S4784 (Apr. 2, 1992). The intent of this declaration, as set forth in the report of the Senate Foreign Relations Committee that gave its advice and consent to ratification, was merely to prevent the creation of an independent cause of action under the treaty. *See* S. Exec. Rept. 102-23., 102d Cong. 2d Sess., at 19 (Mar. 24, 1992). As the present case does not rely on the ICCPR as a basis for its cause of action, the impact and legal status of the declaration on non-self-execution is not relevant.[3] The declaration has no

[2] Declarations and Reservations (as of Aug. 2000), U.N. High Commisssioner for Human Rights (visited Nov. 5, 2000) <http://www.unhchr.ch/html/menu3/b/treaty5_asp.htm>.

[3] The legitimacy of this declaration has been questioned by scholars, who have suggested that it is *ultra vires* and *void ab initio*. *See* Jordan J. Paust, *Avoiding "Fraudulent" Executive Policy: Analysis of Non-Self-Execution of the Covenant on Civil and Political Rights*, 42 DePaul L.Rev. 1257, 1269 (Summer, 1993). Several members of the United Nations Human Rights Committee questioned the U.S. delegation when it presented its initial report on implementation of the ICCPR, as to whether under the Constitution it should fall within the jurisdiction of the Supreme Court to decide whether a treaty is non-self-executing. *See* Summary records of the 1401st and 1402nd meetings: United States of America, 17/04/95, CCPR/C/SR/1401 ¶34 (Ms. Evatt) and CCPR/C/SR/1402 (Mr. Bhagwati).

bearing on the legal force of the substantive provisions of the treaty, or their value as interpretive aides but rather goes solely to the question of remedies and direct creation of a cause of action.[4]

In April 1995, the United States appeared before the United Nations Human Rights Committee, to present its initial State Party Report on implementation of the ICCPR and to answer questions from the Committee, the monitoring body established under Article 28 of the treaty. At that time, a statement was made to the Committee that implementing legislation was not necessary or contemplated as the ICCPR's provisions were already covered by domestic law.[5] *See* Summary record of the 1405th meeting: United States of America. 24/04/95. CCPR/C/SR.1405 (Mr. Shattuck). The United States had declared in its initial report to the Committee, "It is virtually certain that the Supreme Court would strike down any significant distinction between men and women in the enjoyment of the civil and political rights secured by the Covenant, either under the substantive right involved or as a matter of equal protection." *Initial reports of States parties due in 1993: United States of America*, CCPR/C/81/Add.4 (1994) ¶ 105.

Following the presentation of the United States report to the Human Rights Committee, Ms. Evatt, a member of the Committee from Australia, asked

[4] Article 50 of the ICCPR mandates that "[t]he provisions of the . . . Covenant shall extend to all parts of federal States without any limitations or exception." The non-self-executing declaration does not apply to Article 50 of the ICCPR. *See*, Jordan J. Paust, et al., *International Law and Litigation in the U.S.*, 75-76, 398 (West Group 2000).

[5] This statement gives rise to another question as to the meaning of the non-self-executing declaration because the characterization of the treaty provisions as non-self-executing would normally be understood to mean that implementing legislation was required. *See* note 3, *supra*.

"whether the United States Government would encourage courts dealing with rights issues to refer to the Covenant in their decisions." Summary record of the 1401st meeting: United States of America. 17/04/95. CCPR/C/ SR.1401 ¶35. Mr. Lallah, a member of the Committee from Mauritius, expressed the hope "that the judiciary would be made aware of the provisions of the Covenant and the evolving standards resulting from its implementation." Summary record of the 1402nd meeting: United States of America. 17/04/95. CCPR/C/SR.1402. The United States responded that while no separate cause of action was provided for as a result of the non-self-executing declaration, "Many judges were well informed regarding the provisions of the Covenant and many more would become educated through invocation of the Covenant by litigants." Summary record of the 1405th meeting: United States of America. 24/04/95 CCPR/ C/SR ¶5 (Mr. Shattuck).

As a treaty that has recently entered into force in the United States, the ICCPR provides a new source of legal authority for human rights issues that arise under the Constitution. As demonstrated by the dialogue between the U.S. delegation and the Human Rights Committee, there is great interest in the role of the courts and recognition of their importance in giving meaning to the ratification of the treaty.

C. The ICCPR Supports a Finding That Sex Discrimination in the Transmission of Citizenship Violates the Right to Equality Before the Law and Equal Protection of the Law.

In accordance with the principles of equality and non-discrimination set forth in the ICCPR, as well as domestic sources of law, the United States should guarantee its citizens the equal right to confer citizenship on their children born abroad and out-of-wedlock.

Article 26 of the ICCPR provides:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

This provision applies not only to rights enumerated in the ICCPR but to all areas of public regulation. *See* General Comment 18, (thirty-seventh session, 1989), U.N. Doc. HRI\GEN\1\Rev.1 at ¶26 (1994). The Human Rights Committee, in a General Comment on the meaning of Article 26, observed that "not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant." *Id.* at ¶13. This interpretation of Article 26 is consistent with the understanding transmitted by the United States when it ratified the ICCPR that distinctions based upon sex are to be permitted "when such distinctions are, at minimum, rationally related to a legitimate governmental objective." 138 Cong. Rec S4781-01, at S4783 (Apr.2, 1992).

Article 3 of the ICCPR provides, "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant." Similarly, Article 2(1) of the ICCPR provides for equal enjoyment of these rights without distinction of any kind, including sex. Although the equal right of men and women to confer citizenship on their children is not explicitly articulated in the ICCPR, the Human Rights Committee has in a General Comment on the interpretation of Article 3 found that, "there shall be no restriction upon or derogation from the equal enjoyment by

women of all fundamental human rights recognized or existing pursuant to law, conventions, regulations of customs, on the pretext that the Covenant does not recognize such rights or that it recognizes them to a lesser extent." CCPR General Comment 28, CCPR/C/21/Rev.1/Add.10 (2000) ¶9. Moreover, in another General Comment on the interpretation of Article 24, which gives every child the "right to acquire a nationality," the Human Rights Committee stated that "no discrimination with regard to the acquisition of nationality should be admissible under internal law as between legitimate children and children born out of wedlock or of stateless parents or based on the nationality status of one or both of the parents." CCPR General Comment 17 (Thirty-fifth session, 1989) ¶8. The equality and non-discrimination provisions of the ICCPR apply equally to men and women.

In outlining its compliance with Article 24 of the ICCPR, the United States in its report to the Human Rights Committee referred to the Immigration and Nationality Act provisions on citizenship for children born abroad but failed to note the difference between citizen mothers and fathers conferring nationality on their children born abroad and out-of-wedlock.[6] Although this issue was not raised by the Committee in its review of implementation of the ICCPR by the United States, in considering reports from other countries that have noted the existence of such laws, the Human Rights Committee has often commented that discriminatory nationality and citizenship laws

[6] The United States reported, "The Immigration and Nationality Act further provides that a child born abroad to a U.S. citizen parent (or parents) shall acquire U.S. citizenship at birth provided the U.S. citizen parent (or parents) complied with specified requirements for residency or physical presence in the U.S. prior to the child's birth. 8 U.S.C. section 1401." *Initial reports of States parties due in 1993: United States of America.* CCPR/C/81/Add.4 (1994) ¶ 740.

fall short of compliance with the ICCPR. The Committee noted, for example, with regard to Libyan law, which gives fathers the exclusive right to confer nationality on their children[7], that "inequality between men and women persists in a number of areas, such as. . . acquisition and transmission of nationality." Concluding Observations of the Human Rights Committee: Libyan Arab Jamahiriya, CCPR/C/79/Add.101 (1998) ¶17. The Committee expressed similar concern with regard to a law in Lebanon, which provides that nationality is granted only to the children of Lebanese fathers with few exceptions. *See* Concluding Observations of the Human Rights Committee: Lebanon. CCPR/C/79/Add.78 (1997) ¶18.

In the context of potential statelessness of children[8], the Human Rights Committee has also expressed its concern about laws that treat mothers and fathers differently in the transmission of citizenship to children. In Zimbabwe, according to the government, the law provides that "children who are born outside Zimbabwe acquire citizenship if the father or, in the case of an illegitimate child, the mother is at the time of birth a citizen of Zimbabwe," *Initial reports of States parties due in 1992: Zimbabwe*, CCPR/C/74/Add.3. (1997) ¶234. This law led the Committee to note that "children born to Zimbabweans abroad may not acquire

[7] *See CEDAW in the Arab World*, Al-Raida, Vol.15, No. 80/81 at 27 (Winter-Spring, 1998).

[8] The Court has recognized that avoidance of statelessness is an "issue of the utmost import." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 , 160 (1963). Most countries with discriminatory laws on transmission of citizenship provide for transmission of citizenship through fathers rather than mothers. Although there are usually exceptions for children born out-of-wedlock, it is possible that 8 U.S.C. § 1409, operating in conjunction with laws in other countries that deny women the right to transmit citizenship, could result in the statelessness of a child born out-of-wedlock and abroad.

Zimbabwean citizenship." Concluding Observations of the Human Rights Committee: Zimbabwe, CCPR/C/79/Add.89 (1998) ¶19. With regard to Kuwait, where the law restricts to fathers the right to transmit citizenship, with few exceptions,[9] the Committee noted that "children who are born in Kuwait and whose parents are stateless or only the mother has Kuwaiti nationality do not acquire any nationality." Concluding Observations of the Human Rights Committee: Kuwait, CCPR/CO/69/KWT (2000) ¶17.

The jurisprudence of the Human Rights Committee, both in its General Comments and through its ongoing dialogue with States Parties, clearly establishes that laws that discriminate in the transmission of citizenship to children based on the sex of their parents are incompatible with the ICCPR.

D. No Legitimate Governmental Objective Is Served by the Embodiment in Law of Stereotypical Sex-based Assumptions about Parenting.

In judging the legitimacy of governmental objectives set forth to justify sex-based distinctions in 8 U.S.C. § 1409, the Court should consider that internationally, as well as domestically, there is a growing recognition that distinctions based on differences in the parenting roles of fathers and mothers have no validity. The differentiation of mothers and fathers in transmission of citizenship to their children is not "reasonable and objective," nor is its aim "to achieve a purpose which is legitimate under the Covenant," as required by Article 26 of the ICCPR. Moreover, the ICCPR standard of review is equivalent to a lower standard of review than the standard applicable to this case. *See Brief for Petitioners*, Section II., 24-32.

The Convention on the Elimination of All Forms of Discrimination Against Women, *adopted and opened for signature*, Dec. 18, 1979, *entry into force* Sept. 3,

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[9] *See* Initial report of States parties due in 1997: Kuwait, CCPR/C120/Add.1 (1999) at 300-301.

1981, 1249 U.N.T.S. 20378, ("CEDAW"), a treaty that has been ratified by virtually every country in the world, states in its preamble that "the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole," and that "a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women." Article 5(a) of CEDAW provides that "States Parties shall take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women." Article 5(b) provides for "the recognition of the common responsibility of men and women in the upbringing and development of their children..."

More recently, the Platform for Action adopted by the United Nations in 1995 in Beijing notes that "[i]n many countries, the differences between women's and men's achievements and activities are still not recognized as the consequences of socially constructed gender roles rather than immutable biological differences," and that "the upbringing of children requires shared responsibility of parents, women and men and society as a whole." Report of the Fourth World Conference on Women, Beijing, Sept. 4-15, 1995, U.N. Doc. A/CONF.177/20, resolution I, Annex II, ¶ 27-29.

These international principles of equality are mirrored in the jurisprudence of this Court. In *Miller v. Albright*, 523 U.S. 420 (1998), considering the INA provision at issue in this case, Justice Breyer noted that the validity of the statute depended on "the generalization that mothers are significantly more likely than fathers to care for their children, or to

develop caring relationships with their children." *Id.* at 482-83 (1998) (Breyer, J., dissenting). Justice Ginsburg noted that the law in treating mothers and fathers differently was "shaping government policy to fit and reinforce the stereotype or historic pattern." *Id.* at 460 (Ginsburg, J., dissenting). This Court has long recognized that the government should not rely on "overbroad generalizations about the different talents, capacities, or preferences of males and females." *United States v. Virginia*, 518 U.S. 515, 533 (1996) *citing Weinberger v. Weisenfeld*, 420 U.S. 636, 648 (1975), *Califano v. Goldfarb*, 430 U.S. 199, 223-224 (1977).

The presumption that fathers have an inherently less natural relationship with their children than mothers is belied by the facts of this case in which the father served as the primary care-giver. To penalize him as a father through a law that places obligations on him to ensure the transmission of citizenship to his children, which obligations are not placed on a similarly situated mother, is unjust. The law is also out of sync with the nationally and internationally recognized need for the elimination of gender stereotypes and runs contrary to the proactive measures governments have committed to undertake for the promotion of equality between men and women.

II. THE COURT SHOULD CONSIDER THE CONSTITUTIONALITY OF 8 U.S.C. § 1409 WITH REFERENCE TO CUSTOMARY INTERNATIONAL LAW

A. Courts Have Relied on Customary International Law as Part of Domestic Law.

Customary international law, also known as "the law of nations," comprises rules that are "evidence of a general practice accepted as law." *Statute of the*

International Court of Justice Art. 38(1)(b), June 26, 1945, 59 Stat. 1055, 1060 (1945). According to the *Restatement (Third) of the Foreign Relations Law of the United States* § 102(2) (1987), customary international law "results from a general and consistent practice of states which is followed by them from a sense of legal obligation." International conventions, international custom, as evidence of a general practice accepted as law, the general principles of law recognized by civilized nations and judicial decisions are all considered sources of international law. *Id.* at § 102 n.1.

Because general patterns of *opinio juris* and uniformity of behavior establish customary international law, the norms of customary international law are continually evolving. *See Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995) *citing Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980) (that "the courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today"). Customary international law "may be ascertained by consulting the works of jurists, writing professedly on public law, or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law." *United States v. Smith*, 18 U.S. 153, 160-61 (1820); *See also Filartiga v. Pena-Irala*, 630 F.2d at 876, 881 *citing* the Statute of the International Court of Justice as enumerating treaties, international custom, general principles of law, judicial decisions and teachings as sources international law to be applied.

In recent U.S. jurisprudence, customary international law has played a significant role in cases relating to violations of fundamental human rights. Customary international law has also been used to inform the meaning of or to enhance constitutional powers, rights and duties. *See generally* Jordan J. Paust, et. al, International Law and Litigation in the U.S. (West Group 2000). In a landmark ruling, the Second Circuit

interpreted a 1789 statute, the Alien Tort Claims Act, in the context of evolving customary norms, naming torture as the piracy of the twentieth century. *See Pena-Irala*, 630 F.2d at 880. Numerous subsequent cases have relied on customary international law to help define the contours of accountability under U.S. law for torture and other human rights violations. *See Karadzic*, 70 F.3d at 232, *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1544 (N.D. Cal. 1987), *Martinez-Baca v. Suarez-Mason*, No. 87-2057, slip op. at 4-5 (N.D. Cal. Apr. 22, 1988), *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44 (2d Cir. 1991), *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 978 F.2d 493, 502 (9th Cir. 1992), *Abebe-Jiri v. Negewo*, No. 1:90-CV-2010-GET, 1993 WL 814304 (N.D. Ga. Aug. 20, 1993), *aff'd*, 72 F.2d 844 (11th Cir. 1996), *Lafontant v. Aristide*, 844 F. Supp. 128 (E.D.N.Y. 1994).

Customary international law relating to torture has been interwoven with U.S. legislation through the Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) codifying this norm. The interaction between domestic and international law represented by this recent jurisprudence should be replicated in jurisprudence on equality through recognition of equality as a fundamental human right under customary international law.

B. Sex Discrimination in the Transmission of Citizenship Is Contrary to an Emerging Norm of Customary International Law.

Numerous human rights treaties, declarations and resolutions, including the Universal Declaration of Human Rights[10], the ICCPR, the International Cove

[10] *Universal Declaration of Human Rights, adopted and proclaimed by* General Assembly resolution 217 A (III) of Dec. 10, 1948. Article 7 states, "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination." The Second Circuit has noted the conclusion of several commentators that the Universal Declaration of Human Rights has become "in toto, a part of binding customary international law." *Pena-Irala*, 630 F.2d at 883.

nant on Economic, Social and Cultural Rights[11] ("ICESCR"), CEDAW[12] and the Convention on the Rights of the Child[13] ("CRC") recognize equality between men and women to be a fundamental human right. Article 9(2) of CEDAW, a treaty specifically focused on women's rights, articulates the equality principle with specific reference to citizenship, providing, "States Parties shall grant women equal rights with men with respect to the nationality of their children." The United States has signed but not yet ratified CEDAW, ICESCR and the CRC. However, these treaties, CEDAW and the CRC in particular, have been ratified by a broad spectrum and overwhelm-

[11] *International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature*, Dec. 16, 1966, 993 U.N.T.S. 14531 (*entry into force* Jan. 3, 1976). Article 2 (2) provides, "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to . . . sex . . . or other status." Article 3 reads, "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant."

[12] Article 15 of CEDAW provides, "States Parties shall accord to women equality with men before the law."

[13] *Convention on the Rights of the Child, adopted and opened for signature*, Nov. 20 1989, U.N.G.A. Doc. A/Res/44/25 (*entry into force* Sept. 2, 1990). Article 2(1) provides, "States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's . . . sex . . . or other status."

ingly large number of countries. Their equality provisions are an important source of customary international law and should be recognized as such by the Court.

The United Nations has convened four world conferences on women to address issues relating to equality, in Mexico City in 1975, in Copenhagen in 1980, in Nairobi in 1985, and in Beijing in 1995. Recently, the United Nations convened a Special Session of the General Assembly in June 2000 in New York to assess the implementation of the Beijing Platform for Action adopted at the Fourth World Conference on Women in 1995. The declarations issued by all of these conferences prominently highlight the commitment made by governments around the world to equality between men and women. This commitment has been reaffirmed in other United Nations world conferences as well, including the United Nations World Summit for Children in New York in 1990, the United Nations Conference on Environment and Development in Rio de Janeiro in 1992, the World Conference on Human Rights in Vienna in 1993, the United Nations International Conference on Population and Development in Cairo in 1994 and the World Summit for Social Development in Copenhagen in 1995, all of which have upheld the principle of equality between men and women.

The right to equality and the prohibition of discrimination on the basis of sex are also enumerated in Constitutions of countries around the world. A representative sampling of such countries includes Algeria, The Bahamas, Bangladesh, Bolivia, Cameroon, China, Colombia, Ethiopia, India, Japan, Latvia, Lesotho, Madagascar, Mali, Malaysia, Mexico, Monaco, Morocco, Nepal, Nigeria, Pakistan, Peru, Poland, the Sudan, Switzerland, Tanzania, Turkey, Uruguay and Venezuela. *See* Equality Now, *Words and Deeds - Holding Governments Accountable in the Beijing +5 Review Process* (July, 1999).

Although many countries still have laws that discriminate on the basis of sex in the transmission of citizenship, there is a clear and accelerating trend towards the elimination of such laws, in accordance with constitutional and international law norms. While most of these laws deny women rights that men have, the principle of non-discrimination applies equally to men and women.

In Botswana, the case of Unity Dow, now herself a judge on the High Court, successfully challenged the discriminatory law that barred her from transmitting citizenship to her children, born in Botswana. In that case, on the basis of Botswana's constitutional equality provision, the Court of Appeal struck down this provision of the Citizenship Act, which denied Botswana citizenship to any child born within a marriage if, at the time of birth, the father was not a citizen of Botswana. The father in this case was a U.S. citizen. The Court of Appeal cited international law, specifically the African Charter on Human and Peoples' Rights and the Declaration on the Elimination of All Forms of Discrimination Against Women, in finding the discriminatory law unconstitutional. *See Attorney-General of Botswana v. Unity Dow*, CA No. 4/91 at 50, 52-3 (Court of Appeal 1992).

In Canada, the Supreme Court struck down provisions of the Canadian Citizenship Act requiring children of Canadian mothers but not Canadian fathers to submit to a security check in order to be deemed Canadian citizens at birth. The Canadian Supreme Court found this law to be discriminatory in violation of section 15 of the recently adopted Canadian Charter of Rights and Freedoms. In its decision on the citizenship law, which is analogous to the law at issue in this case, the court held, "Only children born abroad of Canadian *mothers* may be legally denied citizenship because of unwillingness to swear an oath. This . . . constitutes a denial of equal benefit of the law. Access

to the valuable privilege of Canadian citizenship is restricted in different degrees depending on the gender of an applicant's Canadian parent." *Benner v. Secretary of State of Canada,* 42 C.R.R.2d 1, ___ (available on WestLaw 1997 CarswellNat 190 at 25). With regard to the justification for the distinction put forward by the government, the Canadian Supreme Court said, "the gender of a citizenship applicant's Canadian parent has nothing to do with the values of personal safety, nation-building or national securities." *Id.* at 24.

Discriminatory citizenship laws have also been challenged successfully through various adjudicative proceedings at the international level. The Human Rights Committee, through its individual complaints procedure established by the Optional Protocol to the ICCPR, found that a discriminatory citizenship law in Mauritius violated the equality provisions set forth in the ICCPR, specifically articles 2(1), 3 and 26 in conjunction with article 23(1). *See Aumeeruddy Cziffra v. Mauritius*, Views of the Human Rights Committee Under Article 5(4) of the Optional Protocol to the ICCPR Concerning Communication No. R.9/35, U.N. GAOR, 36th Sess., Supp. No. 40, U.N. Doc. A/36/40 (1981). The Mauritian Immigration (Amendment) Act and the Deportation (Amendment) Act limited residency rights of alien men married to Mauritian women without similar limitations on alien women married to Mauritian men. Subsequent to this finding, Mauritius changed its law, eliminating the discriminatory provision. *See* Press Release HR/CT/453 (Mar. 19, 1996) (visited Nov. 6, 2000) <http://www.un.org/News/Press> (stating that Section 16 of the Constitution was amended in 1995 to make unconstitutional any law involving discrimination on the grounds of sex, including citizenship laws).

The European Court of Human Rights has also ruled against discriminatory immigration provisions. In a case brought against the United Kingdom, the Court

found the U.K. had violated Article 14, in conjunction with Article 8, of the European Human Rights Convention[14] as a result of the different way in which male and female immigrant residents of the UK were treated in terms of obtaining permission for their wives or husbands to enter or remain in the country. In its decision the court stated, "As to the present matter, it can be said that the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe. This means that very weighty reasons would have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the Convention." *Abdulaziz, Cabales et. al,* 94 Eur. Ct. H.R. (Ser. A) at ¶78 (1985). The court rejected the justification given by the U.K. for its discriminatory law, the intent to protect the labor market, as not sufficient to warrant discrimination on the basis of sex. *See id.* The court also rejected the argument that the U.K. was not in violation of Article 14, the equality right set forth in the European Convention on Human Rights, because it was more generous to immigrant men settled in the U.K. than would otherwise be required by the Convention. *See id.* at ¶82.

There is also a clear legislative trend in which many countries around the world have amended their laws to give parents the equal right to transmit citizenship to their children. Such countries include Japan, Switzerland, Italy, Vietnam, Luxembourg, Malta, Thailand, India, South Africa, and Botswana.[15] Some countries

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[14] Convention for the Protection of Human Rights and Fundamental Freedoms, *entry into force*, E.T.S. No. 5, Rome 4.XI. 1950. Article 14 provides, "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

[15] "Japan and Switzerland amended their laws on this issue in

have acknowledged their international obligation to change discriminatory citizenship laws by withdrawing reservations to Article 9 of CEDAW following such legislative changes. In 1999 the Republic of Korea withdrew its reservation to this Article[16] following a change in its Nationality Act, which had previously required children born to a Korean mother and foreign father to take the nationality of their father. The 1997 Nationality Act confers equal citizenship rights. *See* Korea Legislation Institute, *Statutes of the Republic of Korea* (Supp.4) at 261.

Liechtenstein is another country that has withdrawn its reservation Article 9(2) of CEDAW as a consequence of legislative changes granting men and women equal rights to confer citizenship on foreign spouses and on their children.[17] Fiji also recently withdrew its reservations to Art. 9(2) of CEDAW following the passage of a Constitutional Amendment Act, which provides that a child born outside Fiji may become a citizen if either parent was a citizen on the date of birth.[18] Cyprus[19],

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1985; Italy in 1987; Vietnam in 1988; Luxembourg and Malta in 1989; Thailand in 1991; India in 1992; South Africa in 1994; and Botswana in 1995." UNICEF, *The Progress of Nations 1998* (visited Nov. 6, 2000) <http://www.unicef.org/pon98/pon98.pdf>.

[16] *See* Declarations and Reservations to CEDAW (as of August 8, 2000), U.N. High Commissioner for Human Rights (visited Nov. 5, 2000) <http://www.unhchr.ch/html/menu3/b/treaty9_asp.htm> at n.40.

[17] Committee Takes up Liechtenstein's Report on Compliance With Convention on Elimination of All Forms of Discrimination Against Women (Jan. 25, 1999) Press Release WOM/1083.

[18] *See* Declarations and Reservations to CEDAW (as of August 8, 2000), (visited Nov. 5, 2000) <www.unhchr.ch/html/menu3/b/treaty5_asp.htm> at n. 45.

[19] *Id.* at n.46.

Malaysia[20] and The Bahamas[21] announced their intention to withdraw their reservations to Article 9(2) of CEDAW upon the anticipated amendment of their citizenship laws to ensure the equal rights of men and women. A similar trend to remove discriminatory laws governing the transmission of citizenship to spouses includes recent changes in Venezuela[22], Zimbabwe[23], St. Vincent and the Grenadines[24], Ethiopia[25], and Mauritius[26].

Sex discrimination in transmitting citizenship cannot be justified because it is deliberately more "lenient" with regard to women. Treaty law, national and international case law and recent legislative developments around the world evidence a customary international law norm prohibiting discrimination on the basis of sex in the transmission of citizenship to children, which the United States Supreme Court should incorporate and support in interpreting the Constitution.

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[20] *Id.* at n.32.

[21] *See* Press Release GA/9723 (June 8, 2000) (visited Nov. 6, 2000) <http://www.un.org/News/Press>.

[22] Article 33 of the 1999 Venezuelan Constitution provides for the acquisition of Venezuelan citizenship by "foreigners who contract marriage with a Venezuelan man or woman . . ." whereas Articles 37 and 38 of the previous Constitution prohibited Venezuelan women from transferring citizenship to their foreign-born spouses. Equality No[illegible] Words and Deeds - Holding Governments *Accountable in the Beijing +5 Re view Process* (July, 1999).

[23] *See* Women's Anti-Discrimination Committee Press Release, WOM/1009, 366th Meeting (Jan. 22, 1998) (visited Nov. 5, 2000) <http://www.unhchr.ch/huricane/huricane.nsf/newsroom>.

[24] *See* Press Release WOM/939 (Jan. 21, 1997) (visited Nov. 6, 2000) <http://www.un.org/News/Press>.

[25] *See* Press Release WOM/889 (Jan. 24, 1996) (visited Nov. 6, 2000) <http://www.un.org/News/Press>.

[26] *See* Press Release HR/CT/453 (Mar. 19, 1996) (visited Nov. 6, 2000) <http://www.un.org/News/Press>.

III. THE UNITED STATES SUPREME COURT IS A MODEL FOR OTHER COUNTRIES AND SHOULD PLAY A LEADING ROLE IN THE ESTABLISHMENT AND PROMOTION OF INTERNATIONAL HUMAN RIGHTS LAW

A. High Courts Around the World Look to the Jurisprudence of the United States Supreme Court for Guidance on Matters of Human Rights.

Historically, the United States has played a leading role in the development of jurisprudence on fundamental issues of human rights, which has served as a model for international law and for constitutional protection of rights in many countries. Courts interpreting their Constitutions, which in many cases have been adopted recently, have relied heavily on U.S. principles of justice and on decisions of the United States Supreme Court.

In South Africa, which adopted a new Constitution in 1993, the Constitutional Court in reviewing the right to freedom from self-incrimination, an issue of first impression, noted the important role of the U.S. Supreme Court as follows:

> When for example, the United States Supreme Court finds that a statutory provision is or is not in accordance with the "due process of law" . . . we have regard to these findings, not in order to draw direct analogies, but to identify the underlying reasoning with a view to establishing the norms that apply in other open and democratic societies based on freedom and equality. *Ferreira v. Levin*, CCT/5/95 (S.Afr.).

This decision cited several United States Supreme Court judgments including *Miranda v. Arizona*, 384 U.S. 436 (1966), *Feldman v. United States*, 322 U.S.

487 (1944), *Hoffman v. United States*, 341 U.S. 479 (1951), *United States v. James*, 60 F. 257 (1894), *Ullman v. United States*, 350 U.S. 422 (1956), *Bolling v. Sharpe*, 347 U.S. 497 (1954) *Board of Regents v. Roth*, 408 U.S. 564, *aff'd*, 408 U.S. 593 (1972) and *Meyer v. Nebraska*, 262 U.S. 390 (1923).

In India, the Supreme Court looked to the jurisprudence of the United States Supreme Court in considering freedom of expression and privacy issues.[27] In its decision, the Indian Supreme Court cited *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), *vacated*, 214 S.E.2d 530 (Ga. 1975), *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Roe v. Wade*, 410 U.S. 113 (1973). The High Court in Australia also looked to the Court's decisions when it implied a constitutional protection for freedom of expression in relation to public affairs. *Australian Capital Television PTY Ltd. v. Australia*, 1992 Aust HighCt Lexis 59. In Namibia, when interpreting the equality provision of its new constitution, the High Court looked to decisions from the United States Supreme Court, as well as decisions from the high courts of Canada, England, India, Malaysia and South Africa.[28] In Argentina, the Supreme Court of Justice of the Nation considered the jurisprudence of the United States Supreme Court in a the context of a discrimination case, citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), *aff'd*, 528 F.2d 1102 (8th cir. 1976), *Furnco Constr. Corp. v. Waters*,

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[27] *See* Claire L'Heureux-Dube, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 Tulsa L.J. 15, 29-30 (Fall, 1998) *citing Rajagopal and Another v. State of Tamil Nadu* (1995) 3 L.R.C. 566 (India).

[28] *Mwellie v. Ministry of Works* (1995) 4 L.R.C. 184 (Namib) cited in L'Heureux-Dube, *supra* note 27 at 21.

438 U.S. 567 (1978) and *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982). *See Paola Cassia Ursini v. Gloria Geddes y Otro*, 322 Fallos 2382 (1999).

Certain individual decisions of the United States Supreme Court on fundamental equal protection issues, such as *Brown v. Board of Education of Topeka*, 349 U.S. 294 (1955) have had a particularly global impact. This decision has been cited in the courts of Trinidad and Tobago, when considering the expulsion of a student from school for wearing a *hijab* (veil)[29], as well as a court in New Zealand when considering a treaty on Maori fishing rights.[30] American precedents were cited by these courts not only because they are applicable but also "because they stand for a principle and an approach to constitutional interpretation." Claire L'Heureux-Dube, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 Tulsa L.J. 15, 28 (Fall, 1998).

B. By Referencing International Law in its Judgment, the Court Can Support High Courts in Other Countries in Their Efforts to Promote Human Rights and the Rule of Law.

The pronouncements of this Court are an important source of authority and to the extent that they incorporate or reflect the principles of international law, their application will be of greater value not only for Americans but for all citizens of the world. As Justice Kirby of the Australian High Court noted in a decision of that court:

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[29] *Summayyah Mohammed v. Moraine & Another* (1996) 3 L.R.C. 475, 493 (Trin. & Tobago).

[30] *Te Rananga o Muriwhenua Inc. v. Attorney General* (1990) 2 N.Z.L.R. 641, 656 (C.A.).

> To the full extent that its text permits, Australia's Constitution, as the fundamental law of government in this country, accommodates itself to international law, including insofar as that law expresses basic rights. The reason for this is that the Constitution not only speaks to the people of Australia who made it and accepted it for their governance. It also speaks to the international community as the basic law of the Australian nation which is a member of that community. *Newcrest Mining (WA) Ltd. & Another v. Commonwealth of Australia & Another* (1997) 147 A.L.R. 42, 148 (Austl.).

Justice Claire L'Heureux-Dube of the Supreme Court of Canada has written of the importance of dialogue among high courts, expressing concern that the United States Supreme Court has not played a stronger role in this dialogue by taking note of international and comparative law arguments in its jurisprudence.[31] In this context she specifically cites *Miller v. Albright*, 523 U.S. 420 (1998), in which the Court considered the constitutionality of 8 U.S.C. § 1409, as an example of a case in which the Court might have looked beyond the borders of the United States to such sources and drawn additional strength from them for its opinions.[32] A high level judicial colloquium was convened in 1988 in India on the domestic application of international human rights norms. The "Bangalore Principles" adopted by the meeting, in which judges from around the world (including The United States) participated, affirm that "international human rights instruments provide

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[31] Claire L'Heureux-Dube, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 Tulsa L.J. 15, 40 (Fall, 1998).

[32] *Id.* at 39.

important guidance in cases concerning fundamental human rights and freedoms."[33]

Promoting the rule of law in other countries has long been an objective of the United States Government. The important role of international law was specifically cited by President Bush in connection with the ratification of the ICCPR. In a letter to Chairman Claiborne Pell of the Senate Foreign Relations Committee, President Bush wrote, "The Covenant codifies the essential freedoms people must enjoy in a democratic society, such as . . . equal protection of the law. . . U.S. ratification would also strengthen our ability to influence the development of appropriate human rights principles in the international community and provide an additional effective tool in our efforts to improve respect for fundamental freedoms in many problem countries around the world." 102d Cong., 2d Sess., 24 March 1992, Exec. Rept. 102-23, Appendix A.

As the ICCPR has now been ratified, reference to it as well as to other sources of international law would complement efforts by the United States Government to promote human rights and the rule of law internationally. The United States Supreme Court has a unique role to play in this regard, having so greatly influenced the jurisprudence of other high courts around the world.

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[33] Reprinted in "*Developing Human Rights Jurisprudence: The Domestic Application of International Human Rights Norms*," Commonwealth Secretariat, Human Rights Unit, pages ix-x.

CONCLUSION

For the foregoing reasons Amici respectfully submit that the Court should reverse the judgment of the United States Court of Appeals for the Fifth Circuit and recognize the equal right of men and women to confer citizenship on their children in reference not only to the United States Constitution but also to the International Covenant on Civil and Political Rights and the customary international law principle of equality before the law and equal protection of the law from discrimination on the basis of sex.

Dated: New York, New York
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In the Supreme Court of the United States

OCTOBER TERM, 2000 NOV 13 2000

TUAN ANH NGUYEN AND JOSEPH BOULAIS,
Petitioners,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

On Writ of Certiorari To the United States Court of Appeals For the Fifth Circuit

BRIEF OF *AMICUS CURIAE* ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, INC. IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

		Page
INTEREST OF AMICUS CURIAE		1
SUMMARY OF ARGUMENT		2
ARGUMENT		4
I.	THE COURT HAS THE POWER TO REMEDY THE VIOLATION OF BOULAIS' CONSTITUTIONAL RIGHT TO EQUAL PROTECTION OF THE LAWS	4
	A. The Remedy Sought is Not the Conferral of Citizenship But Rather a Traditional Judicial Remedy	4
	B. The Court's Fundamental Power to Sever Unconstitutional Provisions From a Statute is Not Undermined by the Plenary Power Doctrine	7
II.	THE APPROPRIATE REMEDY FOR THE UNCONSTITUTIONAL GENDER CLASSIFICATION IN 8 U.S.C. § 1409 IS TO SEVER SUBSECTIONS 1409(a)(3) AND (a)(4) FROM THE STATUTE	15
CONCLUSION		23

TABLE OF AUTHORITIES

CASES

Aguayo v. *Christopher*, 865 F. Supp. 479 (N.D. Ill. 1994) 11

Alaska Airlines, Inc. v. *Brock*, 480 U.S. 678 (1987) . . 19, 20

Baker v. *Carr*, 369 U.S. 186 (1962) 8

Bell v. *Hood*, 327 U.S. 678 (1946) 8

Bivens v. *Six Unknown Named Agents of Fed'l Bureau of Narcotics*, 403 U.S. 388 (1971) 8

Buckley v. *Valeo*, 424 U.S. 1 . . . . . 14, 17, 21

Califano v. *Goldfarb*, 430 U.S. 199 (1977) 21

Califano v. *Silbowitz*, 430 U.S. 924 (1977) 21

Califano v. *Westcott*, 443 U.S. 76 (1979) 16, 21

Champlin Refining Co. v. *Corporation Comm'n of Oklahoma*, 286 U.S. 210 (1932) 19, 20

Davis v. *Passman*, 442 U.S. 228 (1979) 8, 11

Deckert v. *Independence Shares Corp.*, 311 U.S. 282 (1940) 8

El Paso & Northeastern R. Co. v. *Gutierrez*, 215 U.S. 87 (1909) 21

Felker v. *Turpin*, 518 U.S. 651 (1996) 20

Franklin v. *Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992) 8

Frontiero v. *Richardson*, 411 U.S. 677 (1973) 9, 17, 21, 22

Graham v. *Richardson*, 403 U.S. 365 (1971) 22

Heckler v. *Mathews*, 465 U.S. 728 (1984) 7, 16, 20, 21, 22

INS v. *Chadha*, 462 U.S. 919 (1983) 8, 12, 13, 14, 19

INS v. *Pangilinan*, 486 U.S. 875 (1988) 5, 6, 10, 11

Iowa-Des Moines National Bank v. *Bennett*, 284 U.S. 239 (1931) 16, 22

Jablon v. *Califano*, 430 U.S. 924 (1977) 21

Jimenez v. *Weinberger*, 417 U.S. 628 (1974) 21

Lake v. *Reno*, 226 F.3d 141 (2d Cir. 2000) 5

McCulloch v. *Maryland*, 4 Wheat. 316 (1819) 14

Marbury v. *Madison*, 5 U.S. (1 Cranch) 137 (1803) 8, 9, 14

Miller v. *Albright*, 523 U.S. 420 (1998) . . . . . passim

Miller v. *Christopher*, 96 F.3d 1462 (D.C. Cir. 1996), *aff'd*, 523 U.S. 420 (1998) 6

Minnesota v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) 17

Regan v. *Time, Inc.*, 468 U.S. 641 (1984) 21

Richardson v. *Griffin*, 409 U.S. 1069 (1972) 21

Rotsker v. *Goldberg*, 453 U.S. 57 (1981) 12

Skinner v. *Oklahoma*, 316 U.S. 535 (1942) 16

United States Dep't of Agric. v. *Moreno*, 413 U.S. 528 (1973) 18, 21

Wauchope v. *United States Dep't of State*, 985 F.2d 1407 (9th Cir. 1993) 10, 11

Webster v. *Doe*, 486 U.S. 592 (1988) 20

Weinberger v. *Weisenfeld*, 420 U.S. 636 (1975) 18, 21

Welsh v. *United States*, 398 U.S. 333 (1970) 9, 12, 22

STATUTES

8 U.S.C. § 1101(23) 5, 20

8 U.S.C. § 1401(g) 5, 15, 24

8 U.S.C. § 1409 . . . . . passim

8 U.S.C. § 1421(d) 20

Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952) 2

§ 309, 66 Stat. 238 2

§ 406, 66 Stat. 281 19

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BRIEF OF *AMICUS CURIAE* ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

The Asian American Legal Defense and Education Fund ("AALDEF"), founded in 1974, is a non-profit organization based in New York City.[1] AALDEF defends the civil rights of Asian Americans nationwide through the prosecution of lawsuits, legal advocacy and dissemination of public information. AALDEF has provided assistance to many individuals and families with citizenship and immigration issues. The legal and factual problems presented by this lawsuit affect large numbers of Asian-American children. The courts

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[1] All parties in this matter have consented to the filing of this *Amicus Curiae* brief, as evidenced by letters of consent filed with the Clerk. AALDEF is not related in any way to any party in this case, and no party or its counsel has authored any part of AALDEF's brief. No person or entity other than AALDEF and its counsel has made any monetary contribution to the preparation of this brief.

must not fail to provide the petitioners a remedy for unequal treatment simply because issues of citizenship are involved.

SUMMARY OF ARGUMENT

At issue in this case is the power of this Court to grant a remedy in a justiciable case to a United States citizen aggrieved by an unconstitutional statute.

The petitioners, a U.S. citizen father (Boulais) and his son (Nguyen), challenge the constitutionality of Section 309 of the Immigration and Nationality Act ("INA"), ch. 477, 66 Stat. 163, 238 (1952) (codified as amended at 8 U.S.C. § 1409 (1999)), which governs the transmission of citizenship at birth to non-marital children born abroad to parents, one of whom is a U.S. citizen. According to petitioners, § 1409 violates Boulais' Fifth Amendment right to equal protection of the laws because it imposes two stringent requirements on U.S. citizen fathers not applicable to U.S. citizen mothers. *Id.* §§ 1409(a)(3) and (a)(4). Petitioners ask the Court to remedy this unequal treatment of fathers by striking these constitutionally offensive provisions and to acknowledge Nguyen's citizenship pursuant to the remainder of the statute. In its brief in response to the Petition for a Writ of Certiorari, however, the government suggests that even if the Court finds that § 1409 unconstitutionally discriminates against Boulais on the basis of sex, it is without power to grant a remedy. Because of the unprecedented nature of the government's position and its harsh implications for the ability of litigants to obtain relief from injuries caused by unconstitutional statutes, we write to address the Court's power and duty to grant the relief petitioners request.

1. The remedy petitioners seek does not require the Court to exercise a power reserved to Congress. Petitioners do not ask the Court to confer citizenship on Nguyen, but rather to confirm the citizenship Congress bestowed on him under the statute unencumbered by unconstitutional defects. As a majority of the Court found in *Miller* v. *Albright*, 523 U.S. 420 (1998), considering the same statutory provisions at issue here, such a remedy does not run afoul of the principle that courts may not grant citizenship as an equitable remedy in the absence of legislative authority.

A contrary holding would amount to an unprecedented ruling that the Court, when faced with a litigant aggrieved by the application of an unconstitutional statute, is completely powerless to remedy the constitutional violation and to grant the litigant relief. Such a radical reduction in the Court's remedial power strikes at the very essence of judicial review recognized since *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803). The power to review entails the power to cure constitutional defects in congressional acts. This inherent judicial power is not eliminated merely because the statute subject to judicial review was enacted pursuant to a congressional power said to be plenary.

2. Assuming that § 1409 violates the Constitution's equal protection requirement, the appropriate remedy is to sever §§ 1409(a)(3) and (a)(4) from the statute. Severance is the remedy that best comports with Congress' intent, as evidenced by the long statutory tradition of conferring citizenship at birth to children born abroad to American citizens and by Congress' inclusion of a severability clause in the statute. Severance also furthers the Court's policy of refraining from invalidating more of a statute than is necessary. Furthermore, severance accords with the Court's longstanding preference for extending the benefits (or removing the burdens) of constitutionally underinclusive statutes.

ARGUMENT

I.

THE COURT HAS THE POWER TO REMEDY THE VIOLATION OF BOULAIS' CONSTITUTIONAL RIGHT TO EQUAL PROTECTION OF THE LAWS

A. The Remedy Sought is Not the Conferral of Citizenship But Rather a Traditional Judicial Remedy

The remedy petitioners seek – an acknowledgment of Nguyen's citizenship pursuant to a statute purged of its constitutionally offensive provisions – is a traditional judicial remedy for injuries caused by constitutionally underinclusive statutes. As a majority of the Court found in *Miller* v. *Albright*, 523 U.S. 420 (1998), addressing the same statutory provision at issue in this case, 8 U.S.C. § 1409, such a remedy does not constitute a grant of citizenship by the Court. Petitioners do not ask the Court to confer citizenship on Nguyen. Rather, petitioners merely ask the Court to strike the two provisions of the statute – subsections 1409(a)(3) and (a)(4) – that violate the equal protection requirement of the Fifth Amendment. Once the unconstitutional provisions are excised, "[t]he statute itself" – and not the Court – would operate to "grant[]" Nguyen "citizenship automatically, and 'at birth.'" *Miller*, 523 U.S. at 489 (Breyer, J., dissenting). In other words, if petitioners were to prevail, a "judgment in [their] favor would confirm [Nguyen's] pre-existing citizenship rather than grant [him]

rights that [he] does not now possess." *Id.* at 432 (Stevens, J.).[2]

Since petitioners do not ask the Court to grant citizenship, the remedy sought does not implicate the principle announced in *INS* v. *Pangilinan*, 486 U.S. 875, 885 (1988), that the general equitable powers of the federal courts do not include "the power to confer citizenship in violation of [statutory] limitations." *Id.* at 885. In *Pangilinan*, a group of Filipino nationals sought naturalization under a special immigration statute that applied only to certain aliens who filed applications for naturalization prior to December 31, 1946. The Filipino nationals conceded that they were not statutorily eligible for naturalization because they did not file their applications prior to the cutoff date. Nonetheless, more than 30 years after the expiration of the statute, they claimed that they were entitled to naturalization as an equitable remedy because the Attorney General had violated the statute by failing to make available a naturalization officer for several months before the cutoff date. The Court held that it could not, as an equitable remedy for the Attorney General's violation of the statute, confer citizenship upon aliens who did not meet the statutory requirements for naturalization. *Id.* at 883-84.

Here, unlike in *Pangilinan*, Nguyen "is not an alien who seeks naturalization as an equitable remedy." *Lake* v. *Reno*, 226 F.3d 141, 149 (2d Cir. 2000) (addressing challenge to § 1409). The INA clearly defines naturalization as "the conferring of nationality of a state upon a person after birth . . . ." 8 U.S.C. § 1101(23) (1999). In contrast, Congress conferred citizenship upon Nguyen at birth, and petitioners

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[2] The government is therefore mistaken that there is no "statute conferring citizenship" upon Nguyen. (Gov't Br. in Response to Cert. Pet., at 4 n.8.) Sections 1401(g) and 1409(a), purged of its constitutional defects, grant him citizenship.

merely ask the Court "to recognize his status, not to confer citizenship." *Lake*, 226 F.3d at 149. Thus, a recognition of Nguyen's citizenship does not run afoul of the *Pangilinan* Court's admonition that only Congress has the power to confer citizenship to persons not constitutionally entitled to citizenship, 486 U.S. at 883-84, because, unlike the respondents in *Pangilinan*, Nguyen's citizenship derives directly from an act of Congress.[3]

A majority of this Court reached the same conclusion in *Miller*. Justice Stevens' opinion agreed with the Court of Appeals' decision in *Miller* that *Pangilinan* did not destroy Miller's standing to contest the government's refusal to treat her as a citizen by rendering the Court incapable of redressing her injury. *Miller*, 523 U.S. at 433 (Stevens, J.).[4] And the dissenting Justices found that "[w]hatever limitations there may be upon a Court's powers to grant citizenship, those limitations are not applicable here, for the Court need not grant citizenship." *Id.* at 488-89 (Breyer, J., dissenting).

Accordingly, the Court should follow the decision reached by a majority of the Justices in *Miller* and hold that an order striking the constitutionally offensive provisions from

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[3] As discussed further *infra*, at 10-11, *Pangilinan* is also distinguishable from this case on another crucial ground: the holding that a grant of citizenship was not an appropriate equitable remedy did not relate to a claim that the act of Congress violated the Constitution.

[4] The Court of Appeals had held that Miller's claim was redressable because, if the statutory provision was held to be unconstitutional, the court could have found Miller to be a U.S. citizen pursuant to the remainder of the statute. *Miller* v. *Christopher*, 96 F.3d 1467, 1470 (D.C. Cir. 1996), *aff'd*, 523 U.S. 420 (1998). "Such a finding," the court held, "would not have violated *Pangilinan*'s proscription on the exercise of judicial equitable power to confer U.S. citizenship in the absence of legislative authority." *Id.*

§ 1409 and recognizing Nguyen's citizenship pursuant to the remainder of the statute does not constitute an impermissible judicial grant of citizenship.

Indeed, a contrary holding would lead to an anomalous result. The remedy sought here is no more a conferral of citizenship by the Court than a remedy extending the benefits of a constitutionally underinclusive welfare statute is a conferral of welfare benefits by the Court. As the cases cited *infra* at 21-22 illustrate, the Court regularly applies its remedial authority to strike unconstitutional limitations on access to benefits conferred by Congress when it determines that extension of the statutory benefits to the class excluded better comports with congressional intent than withdrawal of the benefits from the class included. Although the power to grant welfare benefits is not among the federal courts' general equitable powers, no one contends under such circumstances that an order striking an unconstitutional restriction on eligibility for welfare benefits constitutes an impermissible judicial exercise of legislative power. To the contrary, as part B, *infra*, demonstrates, a holding that an order striking unconstitutional provisions from a congressional statute is tantamount to a judicial usurpation of legislative authority would impermissibly limit the judicial power.

B. The Court's Fundamental Power to Sever Unconstitutional Provisions From a Statute is Not Undermined by the Plenary Power Doctrine

It is well settled that, as a general matter, the Court has the inherent power "to sever the unconstitutional portion [of a statute] from the remainder, and to apply the remainder unencumbered." *Miller*, 523 U.S. at 457 (Scalia, J., concurring in the judgment); *see also Heckler* v. *Mathews*, 465 U.S. 728,

738-39 (1984). Such a remedial power is a necessary corollary to the judicial power to determine cases or controversies before it and interpreting the Constitution.

This Court undoubtedly has the power to remedy violations of the Constitution in justiciable cases within its jurisdiction. It is an inherent feature of the judicial power that "justiciable constitutional rights are to be enforced through the courts." *Davis* v. *Passman*, 442 U.S. 228, 242 (1979).[5] The power to enforce implies the power to grant a remedy. *Franklin* v. *Gwinnett County Pub. Schs.*, 503 U.S. 60, 66 (1992) ("From the earliest years of the Republic, the Court has recognized the power of the Judiciary to award appropriate remedies to redress injuries actionable in federal court. . . ."); *Davis*, 442 U.S. at 245 ("[I]t is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.") (quoting *Bell* v. *Hood*, 327 U.S. 678, 684 (1946)); *Bivens* v. *Six Unknown Named Agents of Fed'l Bureau of Narcotics*, 403 U.S. 388, 396 (1971) (quoting same); *cf. Deckert* v. *Independence Shares Corp.*, 311 U.S. 282, 288 (1940) ("The power to enforce [a statute] implies the power to make effective the right of recovery" under the statute.).

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[5] Although the *Davis* Court noted an exception for "a textually demonstrable constitutional commitment of [an] issue to a coordinate political department," 442 U.S. at 242 (citing *Baker* v. *Carr*, 369 U.S. 186, 217 (1962)), that exception does not apply to challenges to the constitutionality of a statute. *See INS* v. *Chadha*, 462 U.S. 919, 942 (1983) (political question doctrine does not apply to constitutional challenge to the INA because question of "constitutionality of a statute" is "a decision for the courts"). The political question doctrine addresses the Court's authority to determine a constitutional question, not to remedy a constitutional violation. There is no suggestion here that the text of the Constitution reserves the determination of substantive equal protection challenges to Congress.

As part of its power to remedy constitutional injuries, the Court has always recognized its power to remedy the unequal treatment effected by a constitutionally underinclusive statute. *See, e.g., Frontiero* v. *Richardson*, 411 U.S. 677, 691 n.25 (1973) (striking requirement that female members of the uniformed services prove the dependency of their spouses to obtain increased housing and medical benefits when male members were not subject to the same requirement); *see also* cases cited *infra*, at 16-22. To determine the appropriate means of removing the constitutional infirmity from an underinclusive statute, the Court typically looks to the intent of Congress to determine the remedy that best fulfills that intent. *See, e.g., Welsh* v. *United States*, 398 U.S. 333, 355-56 (1970) (Harlan, J., concurring) (noting "the presumed grant of power to the courts to decide whether it more nearly accords with Congress' wishes to eliminate its policy altogether or to extend it to render what Congress plainly did intend, constitutional"). When a Court strikes an unconstitutional provision from a statute pursuant to such an inquiry, it exercises its judicial prerogative to interpret and enforce the Constitution and the statute. It does not infringe on the legislative prerogative because its choice of remedies is that which is consistent with Congress' intent.

The government's position that the Court is without the power to strike the unconstitutional provisions from § 1409 is nothing less than an assault on the principles of judicial review announced in *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803). Under *Marbury*, once the Court decides that the statutory provisions governing the petitioners' case conflict with the Constitution, it "must determine which of these conflicting rules governs the case" and "decide on the operation of each." *Id.* at 177-78. As Justice Marshall declared, "[t]his is of the very essence of judicial duty." *Id.* at 178. In determining the operation of the statute, the Court may not give effect to provisions that it determines violate the Constitution

because, as Marbury teaches, "an act repugnant to the Constitution" may not "become the law of the land." *Id.* at 176; *see also id.* at 177 ("It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it . . . ."). Accordingly, in a justiciable case, the Court cannot avoid striking down statutory provisions that violate the Constitution. Such a "remedial" power is implied in the Court's power and duty to "say what the law is." *Id.* at 177 ("It is emphatically the province and duty of the judicial department to say what the law is."). A finding that the Court is without the power to remedy a constitutionally underinclusive statute is tantamount to a declaration that "an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory," and that the unconstitutional act, "notwithstanding the express prohibition, is in reality effectual." *Marbury*, 5 U.S. (1 Cranch) at 178.

Citing *Pangilinan*, the government nonetheless suggests that the judiciary is powerless to remedy constitutionally underinclusive statutes when those statutes deal with matters of immigration and naturalization, over which Congress' power is said to be "plenary." (Gov't Br. in Response to Cert. Pet., at 4 n.8.) Any such remedy, according to the government, would result in an alteration of the eligibility requirements for citizenship – a result which the Court may not effectuate even if those eligibility requirements violate the Constitution.

But *Pangilinan* does not support such a sweeping limitation on the Court's power to remedy unconstitutional provisions in statutes granting citizenship. *Pangilinan* did "not speak to the courts' capacity to utilize traditional constitutional remedies to rectify constitutional violations." *Wauchope* v. *United States Dep't of State*, 985 F.2d 1407, 1418 (9th Cir. 1993). Rather, *Pangilinan* merely held that courts do not have an independent power to confer citizenship contrary to a

statutory command as an equitable remedy for statutory violations. 486 U.S. at 883-84. Thus, "[b]y recognizing the judiciary's narrow statutory powers with respect to citizenship," the *Pangilinan* Court did not "carve[] out an exception to the traditional authority of courts to remedy equal protection violations by extending the benefits of a discriminatory statute to a disfavored class." *Wauchope*, 985 F.2d at 1418. Indeed, the *Pangilinan* Court itself did not consider its holding with respect to equitable remedies applicable to constitutional claims. After discussing the limitations on federal courts' equitable powers to remedy statutory violations, the Court proceeded to consider (and reject) the merits of the respondents' due process and equal protection claims. *Pangilinan*, 486 U.S. at 885-86.

That the *Pangilinan* Court addressed only remedies for violations of statutory, and not constitutional, rights makes it fundamentally different from this case. The remedies available (express or implied) for violations of statutory rights are circumscribed by the terms of the statute creating such rights. *See Davis*, 442 U.S. at, 241 ("[I]t is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition, who may enforce them and in what manner.") The remedies available for violations of constitutional rights, on the other hand, do not depend on specific congressional authorization. Rather, "the judiciary is clearly discernible as the primary means through which [constitutional] rights may be enforced." *Id.* As one court noted, "one of the oldest principles of constitutional law holds that the judiciary's powers are qualitatively different when a controversy requires a judge to interpret and give effect to the Constitution. Courts do not allow 'statutory limitations' to block the enforcement of the Constitution." *Aguayo* v. *Christopher*, 865 F. Supp. 479, 487 (N.D. Ill. 1994) (citing *Marbury*, 5 U.S. (1 Cranch) at 178).

The government's contention that the "plenary power" of the political branches over immigration and naturalization matters somehow strips the Court of its remedial powers over constitutional underinclusive statutes is unprecedented. While the Court has often deferred to the political branches' substantive immigration and naturalization decisions under the plenary power doctrine,[6] it has never held that the plenary power doctrine prevents the Court from *remedying* constitutional violations committed in the course of Congress' exercise of that power.

Indeed, in other areas in which Congress' power is said to be plenary, there has never been a suggestion that the Court is powerless to remedy a constitutionally underinclusive statute. Thus, in *Welsh*, 398 U.S. at 363-64 (Harlan, J., concurring), Justice Harlan saw no difficulty in concluding that a constitutionally underinclusive draft registration statute should be remedied by extending the conscientious objector exemption even though that decision would have the effect of changing the eligibility requirements for military service – something over which Congress' power is said to be plenary. *Cf. Rotsker v. Goldberg*, 453 U.S. 57 (1981) (deciding merits of equal protection challenge to congressional statute requiring only men to register for draft which, if successful, would have resulted in expansion of class of persons subject to draft).

That the Court has the power to sever an unconstitutional provision from the INA was confirmed in INS v. *Chadha*, 462 U.S. 919 (1983). In *Chadha*, an immigration judge, acting pursuant to the authority Congress delegated to the Attorney General in §§ 244(a) and 244(c)(1) of the INA,

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[6] As petitioners argue in their brief, however, the Court has never extended plenary power to citizenship at birth.

ordered the suspension of Chadha's deportation. Thereafter, pursuant to § 244(c)(2) of the INA, which provided that one house of Congress may veto the decision of the Attorney General to suspend the deportation of an alien, the House of Representatives passed a resolution reversing the suspension of Chadha's deportation. Chadha then brought suit challenging the constitutionality of § 244(c)(1). The Court held that § 244(c)(1) indeed violated the Constitution and, relying on the same severability clause applicable in this case, severed that invalid provision from the statute. The Court's order had the effect of preventing Chadha's deportation despite the specific intent of Congress to the contrary.[7] Indeed, it had the effect of increasing the number of persons subject to suspension of deportation by eliminating Congress' authority to reverse such orders. Yet there was no suggestion that the Court therefore did not have the power to sever § 244(c)(1) from the statute.

It is true that Chadha challenged § 244(c)(2) under the presentment and bicameralism requirements of the Constitution, whereas the petitioners here challenge § 1409 under the equal protection requirement of the Fifth Amendment. That distinction, however, should make no difference to the question of whether the Court has the power to remedy the constitutional violations by severing the unconstitutional provisions from the statute. In either case, a favorable Court decision would have the effect of judicially altering the immigration status of the petitioners and persons similarly situated. The relief requested here is no more an invidious judicial conferral of citizenship than the Court's order in *Chadha* was a judicial suspension of deportation.

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[7] As the *Chadha* Court noted, "if we rule for Chadha, he will not be deported; if we uphold § 244(c)(2), the INS will execute its order and deport him." 462 U.S. at 939-40 (quoting *Chadha* v. *INS*, 634 F.2d 408, 419 (9th Cir. 1980)).

As the discussion above illustrates, any decision striking down a provision of the INA will have the effect of altering the rules Congress set for immigration and naturalization to comport with the requirements of the Constitution. Accordingly, the government's argument that the Court may not order a remedy that would have the effect of changing a litigant's immigration or citizenship status boils down to a contention that the Court is without power to review the constitutionality of legislation affecting immigration and naturalization. This Court has already rejected that contention in *Chadha*. In response to the government's argument in *Chadha* that the plenary power doctrine prevented the Court from engaging in judicial review of the INA, this Court said:

> As we made clear in *Buckley* v. *Valeo*, 424 U.S. 1 (1976): "Congress has plenary authority in all cases in which it has substantive legislative jurisdiction, *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819), so long as the exercise of that authority does not offend some other constitutional restriction." *Id.*, at 132.

Chadha, 462 U.S. at 941. And indeed, the government concedes that the Court may decide the constitutionality of § 1409. (Gov't Br. in Response to Cert. Pet., at 8 n.4.)

In sum, there is nothing in the plenary power doctrine that undercuts the judiciary's essential power to strike down unconstitutional provisions in an act of Congress. The remedy sought here is no more than a traditional judicial remedy for constitutionally underinclusive statutes; any ensuing "grant" of citizenship will derive from the operation of the statute and not from an act of the Court. The government's position, on the other hand, would radically redefine the nature of the judicial power. It would require the Court to give effect to an

unconstitutional law, leaving petitioners without any remedy for a clear violation of a constitutional right. But as Chief Justice Marshall stated, our government "has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Marbury*, 5 U.S. (1 Cranch) at 163.

II.

THE APPROPRIATE REMEDY FOR THE UNCONSTITUTIONAL GENDER CLASSIFICATION IN 8 U.S.C. § 1409 IS TO SEVER SUBSECTIONS 1409(a)(3) AND (a)(4) FROM THE STATUTE

Petitioners are aggrieved by the impermissible gender distinction employed by Section 1409 between U.S. citizen fathers and U.S. citizen mothers in the transmission of citizenship to their non-marital, foreign-born children. Petitioners and *amici* contend that the appropriate remedy for such unconstitutional discrimination is for the Court to strike subsections 1409(a)(3) and (a)(4) from the remainder of the INA. Subsection 1409(a)(3) requires that citizen fathers agree in writing to provide financial support for their child until the child reaches the age of 18. Subsection 1409(a)(4) requires that, before the child reaches the age of 18, citizen fathers legitimate their child or acknowledge paternity under oath, or that a court establish paternity. Neither of these requirements is applicable to citizen mothers.[8] Accordingly, as petitioners

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[8] While §1409(c) imposes a one-year continuous residency requirement on citizen mothers and not citizen fathers, citizen fathers are subject to a five-year residency requirement pursuant to 8 U.S.C. § 1401(g). Whatever disparity would remain if the Court were to strike subsections 1409(a)(3) and

(continued...)

argue in their brief, the statute is constitutionally underinclusive because it renders it more difficult for citizen fathers to transmit citizenship at birth to their children.

Severance of subsections 1409(a)(3) and (a)(4) is the appropriate remedy to cure this constitutional defect for several reasons. Principally, severance of these constitutionally offensive provisions is the remedy that most faithfully accords with Congress' intent in enacting the citizenship-at-birth scheme of the INA. When an equal protection claim is sustained with respect to an underinclusive statutory regime, the Court faces "two remedial alternatives: [it] may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion." *Heckler* v. *Mathews*, 465 U.S. 728, 738 (1984) (quoting *Welsh* v. *United States*, 398 U.S. 333, 361 (1970) (Harlan, J., concurring)); *see also Califano* v. *Westcott*, 443 U.S. 76, 89 (1979); *Skinner* v. *Oklahoma*, 316 U.S. 535, 543 (1942); *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239, 247 (1931). This general rule is premised on the notion that the appropriate remedy for the abridgment of the right to equal protection is a mandate of equal treatment, "a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Mathews*, 465 U.S. at 740.

In deciding which of these remedial alternatives to apply, the Court is guided by the intent of Congress. *See Mathews*, 465 U.S. at 739 n.5. Specifically, the Court looks to

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[8] (...continued)
(a)(4) is not being challenged by petitioners here because petitioner Boulais satisfies the requirements of section 1401(g) and, even if imposed on him, the requirements of §1409(c).

legislative intent to determine whether or not severance of the offensive provision is the appropriate remedy. *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999)(The question of whether a statutory provision is severable "is essentially an inquiry into legislative intent."). "'Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as law.'" *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976) (quoting *Champlin Refining Co.* v. *Corporation Comm'n of Oklahoma*, 286 U.S. 210, 234 (1932)).

To determine the appropriate remedy here, therefore, the Court should look to Congress' intent in enacting the citizenship-at-birth scheme of the INA. Sections 1401 and 1409 set standards by which citizen parents may confer citizenship at birth upon their non-marital children born abroad. These provisions are part of a long statutory tradition which "has consistently recognized the rights of American parents to transmit their citizenship to their children," and reflects a congressional decision to extend citizenship to children born outside the United States. *Miller*, 523 U.S. at 477-79) (Breyer, J., dissenting).

The fact that Section 1409 imposes certain limitations on citizen parents' ability to transmit citizenship to their children does not detract from the fact that Congress' overriding purpose was to extend citizenship to non-marital children born abroad to a United States citizen. This conclusion is supported by this Court's finding in *Frontiero* v. *Richardson*, 411 U.S. 677, 691 n.25 (1973), that the "basic purpose" of the statutes at issue in that case "was to provide fringe benefits to members of the uniformed services," even though the statutes also established clear limitations, based on impermissible gender

stereotyping, on those who would be eligible for the benefits. *See also Weinberger* v. *Weisenfeld*, 420 U.S. 636, 651 (1975) (citing purpose of social security provision as "enabling the surviving parent to remain at home to care for a child" even though the provision limited benefits based on gender stereotypes); *United States Dep't of Agric.* v. *Moreno*, 413 U.S. 528, 533-34 (1973) (citing purpose of federal food stamp program as "permit[ting] low-income households to purchase a nutritionally adequate diet through normal channels of trade," despite limitation, based on irrational classification, of food stamp benefit to certain households) (internal quotations omitted). As in those cases, the Court's removal here of the impermissible limitations on the conferral of citizenship at birth would conform with the INA's basic purpose.

Striking subsections 1409(a)(3) and (a)(4) would preserve the overall scheme erected by Congress to confer citizenship on the foreign-born children of U.S. citizen parents. These provisions "seem designed in significant part to address difficulties in proving paternity (along with providing encouragement for fathers to legitimate the child)." *Miller*, 523 U.S. at 489 (Breyer, J., dissenting). Proof of paternity is already mandated by subsection 1409(a)(1), which petitioners do not challenge here, and may be accomplished with reliability and relative ease through DNA testing. Moreover, there is no indication that Congress so strongly sought to encourage the act of legitimation by citizen fathers that, in the absence of that requirement, it would have altogether abandoned its policy of conferring citizenship at birth to the foreign-born children of unwed U.S. citizen parents, a policy that has persisted for more than two centuries. *See Miller*, 523 U.S. at 461-68 (Ginsburg, J., dissenting) (tracing history of statutes governing citizenship of foreign-born children).

On the contrary, the presence in the INA of a

severability provision strongly suggests that Congress would prefer severance of subsections 1409(a)(3) and (a)(4). *See* Immigration & Nationality Act, ch. 477, § 406, 66 Stat. 166, 281 (1952) (codified at 8 U.S.C. § 1101 note). That provision states as follows:

> If any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

Id. The presence of a severability clause "discloses an intention to make [a statute] divisible and creates a presumption that, eliminating invalid parts, the legislature would have been satisfied with what remained and that the scheme of regulation derivable from the other provisions would have been enacted without regard" to the invalid provision. *Champlin*, 286 U.S. at 235. "In such a case, unless there is strong evidence that Congress intended otherwise, the objectionable provision can be excised from the remainder of the statute." *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 686 (1987).

The INA's severability clause has already been construed by this Court to reflect Congress' preference for severability where a provision of the Act is found unconstitutional. *See INS v. Chadha*, 462 U.S. 919, 932 (1983). In *Chadha*, the Court found that "Congress itself has provided the answer to the question of severability" by including the severability clause. The Court noted that the clause "is unambiguous and gives rise to a presumption that Congress did not intend the validity of the Act as a whole, or of any part of the Act, to depend upon whether" the legislative veto provision was invalid. *Id.* Here, like in *Chadha*, "Congress could not

have more plainly authorized the presumption" that the requirements of subsections 1409(a)(3) and (a)(4) are severable from the remainder of Section 1409 and the INA generally. *Id.*; *cf. Mathews*, 465 U.S. at 739 n.5 (noting that severability clause "clearly expressed [Congress'] preference for nullification" of exception to pension offset provision of the Social Security Act).

A legislative intent not to sever the offensive provisions cannot be inferred from 8 U.S.C. § 1421(d). That provision states that "[a] person may only be naturalized as a citizen of the United States in the manner and under the conditions prescribed in this subchapter and not otherwise."[9] Id. That provision is inapplicable here because citizenship at birth, acknowledgment of which is sought by the petitioners, does not constitute "naturalization" as that term is used in the INA. *See* 8 U.S.C. § 1101(a)(23) (defining "naturalization" as "the conferring of nationality of a state upon a person *after* birth, by any means whatsoever") (emphasis added).

In addition to the fact that severance complies with unambiguous congressional intent, the Court should sever subsections 1409(a)(3) and (a)(4) because that remedy properly "refrain[s] from invalidating more of the statute than is necessary" to correct the constitutional infirmity. *Regan* v.

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[9] Any attempt to read this provision as a congressional effort to preclude any form of judicial redress where provisions of the INA are found unconstitutional, would raise serious constitutional problems. *See Felker v. Turpin*, 518 U.S. 651, 661-62 (1996) (noting that since statute did not altogether repeal Court's power to review habeas corpus petitions, it did not deprive the Court of appellate jurisdiction in violation of Article III, § 2 of the Constitution); *Webster v. Doe*, 486 U.S. 592, 603 (1988) (referring to "serious constitutional question that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim").

Time, Inc., 468 U.S. 641, 652 (1984) (plurality opinion); *see also Alaska Airlines*, 480 U.S. at 684. "[W]henever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid." *El Paso & Northeastern R. Co.* v. *Gutierrez*, 215 U.S. 87, 96 (1909). Severance of subsections 1409(a)(3) and (a)(4) adheres to these remedial principles and leaves a residual statute that is "fully operative as law." *See Buckley*, 424 U.S. at 108.

Furthermore, the severance remedy – which would remove burdens placed on citizen fathers and not on citizen mothers – is not only within the Court's power, but the Court has indicated a preference for removing burdens from and extending benefits to parties aggrieved by constitutionally underinclusive statutes. *See Westcott*, 443 U.S. at 89 ("In previous cases involving equal protection challenges to underinclusive federal benefits statutes, this Court has suggested that extension, rather than nullification, is the proper course."); *see also Mathews*, 465 U.S. at 735 n.5 (quoting same); *Frontiero*, 411 U.S. 677 (resulting in extension of military fringe benefits to class of servicewomen); *see also Califano* v. *Goldfarb*, 430 U.S. 199 (1977) (resulting in extension of Social Security survivors benefits to class of widowers); *Califano* v. *Silbowitz*, 430 U.S. 924 (1977) (resulting in extension of Social Security insurance benefits to class of spouses of female wage earners); *Jablon* v. *Califano*, 430 U.S. 924 (1977); *Weinberger*, 420 U.S. 636 (resulting in extension of Social Security insurance benefits to class of spouses of female wage earners); *Jimenez* v. *Weinberger*, 417 U.S. 628 (1974) (resulting in extension of disability benefits to subclass of illegitimate children); *Moreno*, 413 U.S. 528 (resulting in extension of food assistance to households containing one or more unrelated persons); *Richardson* v. *Griffin*, 409 U.S. 1069 (1972) (resulting in extension of Social

Security benefits to class of non-marital children of deceased wage earners); *Graham* v. *Richardson*, 403 U.S. 365 (1971) (resulting in extension of welfare benefits to class of aliens); *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239, 247 (1931) (ordering refund for tax paid in excess of amount assessed to others similarly situated to taxpayer).

At times, this preference for extension of benefits has been expressed as a means of effectuating Congress' primary purpose underlying the larger legislative scheme. *See, e.g.*, *Welsh*, 398 U.S. at 365-66 (Harlan, J., concurring) (noting that extension of conscientious objector status to secularists accords with overall congressional policy, which provides "compelling reason to hazard the necessary statutory repairs"). Because, as noted *supra*, severance of subsections 1409(a)(3) and (a)(4) leaves Congress' overall citizenship-at-birth scheme operative and intact, and furthers the "basic purpose" behind that scheme, the Court should advert to its practice in remedying constitutional infirmities in underinclusive statutes and fashion relief for petitioners that reduces their burdens rather than imposes burdens on others.

Finally, severance of subsections 1409(a)(3) and (a)(4) – thus equalizing the citizenship at birth scheme by lifting burdens imposed uniquely on citizen fathers – is more appropriate here than other remedial options, such as imposing these burdens on citizen mothers or denying altogether the conferral of citizenship by unmarried citizen parents to their foreign-born children. Not only would these latter options undermine Congress' unambiguous legislative purposes and depart from this Court's routine practice of extending rather than nullifying benefits where underinclusive statutes are deemed invalid, but they would also raise serious due process concerns by imposing burdens on persons not before the Court.

CONCLUSION

If the Court finds that the challenged gender classification in 8 U.S.C. § 1409 violates the Constitution, it must cure that violation and grant Nguyen and Boulais relief. Severance of the provisions that heap special burdens on U.S. citizen fathers comports with Congress' purpose in enacting the citizenship-at-birth provisions of the INA and accords with this Court's stated preference, when remedying constitutionally underinclusive statutory regimes, to remove burdens placed on the aggrieved party rather than impose such burdens on others.

Once those provisions are severed, Nguyen's eligibility for citizenship is measured by the remaining provisions of the INA governing conferral of citizenship. It is these provisions, and not the Court, that confer citizenship upon Nguyen. A contrary holding would undermine the time-honored principle of judicial review, as enunciated in *Marbury v. Madison*, for it would mean the Court is powerless to redress justiciable constitutional infirmities. Such a holding would impermissibly diminish this Court's role in our constitutional system of government.

For these reasons, the *amicus curiae* respectfully requests that the Court remedy the constitutional infirmity in 8 U.S.C. § 1409 by severing subsections (a)(3) and (a)(4) and acknowledge the citizenship, conferred by 8 U.S.C. § 1401(g) and the remainder of section 1409, of petitioner Nguyen.

Respectfully submitted,

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